(1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DAVID HENSON MCNAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding, in direct conflict with decisions of at least five circuits, that a federal court may refuse to accord deference to a foreign sovereign's official interpretation of its own laws, in cases where such foreign laws provide a rule of decision that the federal court must apply.

2. Whether, on direct review before a criminal conviction becomes final, a federal court may refuse to give effect to the clarification, invalidation, or repeal of a law included within the offense of conviction.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were defendants-appellants in the consolidated appeals below and are respondents in this Court: Robert D. Blandford, Abner J. Schoenwetter, and Diane H. Huang.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Henson McNab respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a), as amended on grant of partial rehearing, is reported at 331 F.3d 1228 (11th Cir. 2003). The orders of the United States District Court for the Southern District of Alabama regarding foreign law (Pet. App. 44a-76a) are unreported.

JURISDICTION

The district court had jurisdiction over the case against Mr. McNab pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction to review the final judgment of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on March 21, 2003. The court of appeals granted rehearing in part and denied Mr. McNab's suggestion for rehearing en banc on May 29, 2003. Pet. App. 78a. On August 8, 2003, Justice Kennedy extended the time to file a petition for a writ of certiorari to and including September 26, 2003. *See* Application No. 03A108. On September 20, 2003, Justice Kennedy further extended the time to file the petition to and including October 24, 2003. *Id.* The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment, U.S. CONST. amend. V; the pertinent provisions of the Lacey Act, 16 U.S.C. §§ 3371 *et seq.*, and the statutes of conviction; and the relevant provisions of Honduran constitutional, statutory, and administrative law are set forth in the Appendix at 92a-113a and 328a-418a.

STATEMENT OF THE CASE

Petitioner David Henson McNab, a Honduran lobster fisherman, was convicted under federal statutes that require, as an essential predicate, proof that Mr. McNab imported fish or wildlife into the United States in violation of "any foreign law." The prosecution's theory was that Mr. McNab violated the laws of Honduras, because all of his lobsters were packed in plastic (rather than cardboard boxes) and because some of his lobsters had tails that were too short or showed signs of having borne eggs. The Republic of Honduras, through its embassy, appeared before the court of appeals and demonstrated, through the opinions of officials who are authorized to issue binding interpretations of Honduran law and given the exclusive power to represent Honduras, that Mr. McNab's conduct did ***not*** violate any laws of Honduras.

A divided panel of the Eleventh Circuit nonetheless affirmed the convictions, and a draconian eight year sentence, because (contrary to the approach followed by numerous other circuits with respect to issues of foreign law) it declined to defer to the official views of the Republic of Honduras. The majority cited considerations of "finality," reasoning that Honduras's official position is at odds with the testimony of lower-ranking Honduran employees on whom the prosecution relied—witnesses who, according to the Honduran government's official position, were unauthorized, incompetent and wrong. And the majority also justified its refusal to defer to the official interpretation that Honduras gives to its own laws because it believed (contrary to other circuits, which presume the regularity of the official actions of foreign governments) that foreign governments may be corruptly influenced to manipulate their own laws to the detriment of U.S. prosecutions. These conclusions, which clearly depart from this Court's cases and from how other circuits determine recurring issues of foreign law, warrant this Court's review.

1. David Henson McNab is a Honduran citizen whose family has been engaged in the fishing business for genera-

tions. Some of the lobsters caught by his company's vessels in the Caribbean are imported into the United States.

In early March 1999, agents of the National Marine Fisheries Service (NMFS) seized a shipment by Mr. McNab's company in Bayou La Batre, Alabama, following the receipt of an anonymous fax a month earlier. *See* Pet. App. 4a-5a. The fax had alleged that the shipment would contain "undersized" lobsters and lobsters packed "in bulk"; it also had stated that "Honduran law . . . requires that all product[s] exported from our country should be packed in boxes." *Id.* at 252a. The agents determined that the lobsters in the shipment were wrapped in plastic bags. *Id.* at 5a. A small proportion of the shipment (about 7 percent) were or had been egg-bearing; an even smaller percentage of the lobster tails (about 3 percent) measured under 5.5 inches. *See id.* at 183a-84a.

Following receipt of the anonymous fax, NMFS agents contacted various officials of the Honduran fisheries service (DIGEPESCA), a part of the Honduran Ministry of Agriculture and Livestock, by telephone and by letter to seek help in their investigation. After the seizure, a NMFS agent also traveled to Honduras with a U.S. government attorney and met with several officials and employees of the Ministry of Agriculture and Livestock, including the Minister. Pet. App. 5a. In the ensuing months, various officials of the Ministry provided to U.S. authorities copies of Honduran statutes and regulations, historical information about fishing practices in the Caribbean islands that lie off the coast of Honduras, and other information requested by U.S. authorities. *Id.* at 4a-6a.

In May 2000, the U.S. government indicted Mr. McNab and three American co-defendants who regularly purchased and distributed shipments of lobster from Mr. McNab's company. The basis for the prosecution was the Lacey Act, 16 U.S.C. §§ 3371 *et seq.*, which bars the importation of "any fish or wildlife taken, possessed, transported, or sold in viola-

tion of any law or regulation of any State or in violation of any foreign law." *Id.* § 3372(a)(2)(A).[1]

All of the charges against Mr. McNab were predicated solely on alleged violations of Honduran laws and regulations relating to lobster fishing and packing. The evidence presented focused on Mr. McNab's alleged violation of three Honduran laws or regulations: (1) a regulation requiring that lobsters be individually packed in cardboard boxes; (2) a regulation governing the permissible size of kept lobsters; and (3) a statute that, according to the prosecution, prohibited the harvesting or destruction of egg-bearing lobsters. Pet. App. 18a-19a.[2]

The packaging regulation, Acuerdo ("Agreement") No. 0008-93, was promulgated in 1993 pursuant to a 1973 meat-

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[1] Mr. McNab was not charged with a Lacey Act violation, but the Act underlay all of the charges against him: a charge of money laundering accused him of depositing proceeds from the commission of the crime of "importation contrary to law," *see* 18 U.S.C. § 545, and the "importation contrary to law" charge in turn accused him of transporting lobsters "contrary to" the Lacey Act. *See* Pet. App. 2a-3a & n.1. Related conspiracy counts likewise were predicated on Lacey Act violations. *Id.* at 118a-19a. Mr. McNab's co-defendants (but not Mr. McNab) were accused of violating (and conspiring to violate) Florida law as well. *Id.* at 224a, 245a.

[2] The prosecution also proffered other supposed violations of Honduran norms, including "closed season" rules, shrimping regulations, and statutory provisions requiring that lobster boats land their catch in Honduras and file "catch reports" with the Honduran authorities. The district court directed a verdict of acquittal for Mr. McNab on the closed season and shrimping rules; the government never charged violation of the landing requirement in the indictment; and Mr. McNab showed at trial that he did in fact file the required catch reports. Pet. App. 205a-06a, 215a; *see id.* at 138a-39a, 202a-04a.

inspection statute. Acuerdo No. 0008-93 listed a number of detailed prescriptions for the icing and packaging of Honduran-caught lobster, including the requirement that, before export, lobsters be packaged in boxes. Pet. App. 354a. The size regulation, Resolution No. 030-95, was issued in 1995 under the sole authority of the Minister of Agriculture and the head of DIGEPESCA; it purported to prescribe 5.5 inches as the minimum abdominal length for kept lobsters. *See id.* at 403a. The remaining statute, Article 70 of the Fishing Law of 1959, provided penalties for "[t]hose who destroy or harvest the eggs, or the offspring of fish, chelonians or other aquatic species for profit." *Id.* at 395a. The prosecution contended that this statute barred the harvesting of egg-bearing aquatic species, not merely the eggs themselves.

2. In September 2000, before the trial, the district court convened a foreign law hearing to determine the validity and scope of the Honduran laws on which the charges against Mr. McNab rested.[3] Mr. McNab presented testimony by Honduran-law experts, including a former Honduran Minister of Justice. These witnesses explained, *inter alia*, that the egg-harvesting statute did not forbid the harvesting of lobsters or other marine wildlife that happened to be bearing eggs when caught (as opposed to harvesting the eggs themselves, as in the case, for example, of turtles). Pet. App. 58a. They also testified that the size restriction set forth in Resolution No. 030-95 was void because, under Honduran law, generally applicable rules (such as the size restriction) may be validly promulgated only if they are signed by the President when issued. *Id.* at 53a, 176a-80a, 186a-95a. It was undisputed that Resolution No. 030-95 was not so signed; it had been

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[3] As reflected in the order issued by the district court following the foreign-law hearing, the hearing considered a number of additional prosecution claims under Honduran law that the prosecution ultimately abandoned before the case went to the jury. *E.g.*, Pet. App. 59a; *see supra* note 2.

promulgated under the sole authority of the Minister of Agriculture and the head of DIGEPESCA. *Id.* at 403a. Indeed, Mr. McNab also submitted a legal opinion by the incumbent Attorney General of Honduras—Hector Ramon Tróchez—who confirmed that the President's failure to sign the size restriction resulted in the "invalidity of these regulations." *Id.* at 254a-56a; *see id.* at 192a-94a.

The prosecution's only Honduran-law witness was Liliana Paz, a midlevel official of the Honduran Ministry of Agriculture and Livestock. As "Secretary-General" of that ministry, her functions were to act as its "instrument of communication" and to perform certification duties. Her duties did not include legal interpretation. Pet. App. 160a, 262a-63a. Ms. Paz testified that all of the regulations and statutes on which the prosecution relied were valid and applicable to Mr. McNab's conduct. *Id.* at 161a-71a.

Based on Ms. Paz's testimony, which it termed "critical" to its analysis, the district court held that the three Honduran laws and regulations were valid and that the prosecution could present evidence of their violation at trial. Pet. App. 56a. In particular, the court found itself in a "dilemma" over the size regulation's validity, but relied on Ms. Paz for the proposition that "the Honduran government view[ed] the [size restriction] to be valid." *Id.*

3. The case proceeded to trial based on Honduran law and regulations and, in the case of the defendants other than Mr. McNab, on the basis of Florida laws as well. Pet. App. 224a. Mr. McNab was convicted in November 2000. In August 2001, the district court sentenced Mr. McNab under the Guidelines to 97 months in prison—more than eight years. Pet. App. 82a.[4] Mr. McNab had remained free on bond until

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[4] Mr. McNab's sentence was calculated based on the value of entire shipments of lobster; because they were packed in plastic rather than in cardboard boxes, the entire shipments were deemed to violate the Honduran packaging regulation and hence the Lacey

then, traveling back and forth to Honduras but appearing at each and every hearing as required, and the district court agreed to continue bond pending appeal. *Id.* The government appealed and, one day later, the Eleventh Circuit ordered Mr. McNab confined. He remains incarcerated.

4. After the foreign-law hearing, Mr. McNab brought an action in the Honduran administrative-law courts seeking a declaration that the size regulation, Resolution No. 030-95, was invalid, because it was not signed by the President when issued. The prosecution had earlier suggested that Mr. McNab's failure to seek such relief in Honduras confirmed the regulation's validity. *See* Pet. App. 7a & n.9, 170a, 180a. In May 2001—several months after Mr. McNab's trial had ended—the Honduran Court of First Instance of Administrative Law ruled that the size restriction did indeed "violate[] the legal code at the time [it was] issued." *Id.* at 298a.[5]

Mr. McNab's attorneys also discovered after trial that the 1973 statute under which the packaging restrictions were promulgated had in fact been repealed in 1995. They obtained expert testimony—from a Honduran administrative law professor; from the former President of Honduras who

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Act, and the shipments' full value was deemed the "proceeds" of money laundering. *See* Presentence Investigation Report 19, 23.

[5] Under the Honduran Administrative Code, the court could entertain the challenge to the regulation only if it was "null and void as a matter of law" but was still "producing effects," in which case the court could, under Article 32 of said Code, declare it "null and void and inapplicable in the future." Pet. App. 297a, 420a. The administrative-law court's decision did precisely that, stating (in the words of Article 32) that Resolution No. 030-95 was "entirely voided, but this is only for purposes of their annulment and future inapplicability: This Resolution does not confer any right to claims," *i.e.*, monetary claims against the government for enforcing the law before it was declared invalid. *Id.* at 298a.

had signed the packaging regulation; and from other attorneys—that in the Honduran legal system, "regulations are automatically repealed when the law under which they were issued is repealed." Pet. App. 71a & n.9. Indeed, they even obtained an affidavit from Ms. Paz to the same effect.

Because these developments revealed that neither the size restriction nor the packaging regulation was valid during the time period charged in the indictment, Mr. McNab moved for a new trial. He also presented to the district court a more recent Honduran statute repealing the egg-harvesting statute—which, under the Honduran Constitution, operated retroactively. *See* Pet. App. 406a, 415a. The prosecution opposed the motion, relying once again on the purported expertise of Ms. Paz, who submitted a supplemental affidavit that recanted her recent affidavit agreeing with Mr. McNab on the effect of the 1995 repeal and opined that all relevant laws and regulations remained valid and binding. *See id.* at 72a, 76a.

The district court denied the motion in August 2001, a few weeks after Mr. McNab was sentenced. The court first reasoned that it need not give effect to the Honduran court's invalidation of the size restriction because the Honduran government was appealing the ruling and "continu[ing] to enforce" the regulation pending the appeal, and because, although the district judge admittedly found the "legal meaning" of the Honduran court's opinion "not entirely clear," he thought that the ruling voided the size restriction only prospectively. *Id.* at 70a. The court concluded that the packaging restriction remained in effect despite the 1995 repeal of the authorizing statute, because a replacement statute could validate it and, again, because the government continued to enforce it. *Id.* at 71a-73a. Finally, although given "pause" by the deletion of the egg-harvesting provision from the Honduran statute books, which it found "troubling," the court concluded (based on Ms. Paz's assertion) that the restriction nonetheless retained vitality under Honduran law. *Id.* at 75a-76a.

In October 2001, two months after the district court rejected Mr. McNab's motion, the Honduran Court of Appeals of Administrative Law unanimously affirmed the lower-court decision invalidating the size regulation. Pet. App. 302a-04a. The Honduran government filed no further appeal.

5. Mr. McNab also challenged Ms. Paz's conduct in testifying for the prosecution and the substance of her testimony by bringing the equivalent of a civil rights complaint before the Honduran National Human Rights Commissioner. The Commissioner is authorized by Honduran law to examine whether allegedly arbitrary or unlawful conduct by Honduran government officials constitutes "legal error," "abuse of power," or "negligence." Pet. App. 309a. In early November 2001, the Commissioner issued a written report concluding that Ms. Paz's testimony had been legally wrong in numerous respects. *Id.* at 306a-13a. The report recommended that her superior—the Minister of Agriculture—"[d]isqualify as an error of law" her previous actions in Mr. McNab's case. *Id.* at 312-13a.[6] As required by Honduran law, the report was delivered to the Minister, who was obliged to respond in

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[6] The Commissioner, Dr. Leo Valladares, is internationally recognized as a distinguished constitutional lawyer, law professor, and human rights advocate. His reputation for independence and diligence has been recognized by the U.S. Congress and other legislative bodies and led his peers in the human rights community to elect him both President of the OAS's Inter-American Commission on Human Rights and President of the Ibero-American Federation of Ombudsmen. *See, e.g.*, S. Res. 72, 14th Leg. Assem., 1st Reg. Sess. (P.R. 2001); Testimony of Dr. Leo Valladares Lanza on the Human Rights Information Act (May 11, 2003) (LEXIS, News Library, Fednew File); Douglass W. Cassel Jr., *An Institution That Deserves U.S. Support*, CHI. DAILY L. BULL., Oct. 17, 1995, at 5 (listing Dr. Valladares's successes as ombudsman and citing him as an example of "truth-telling . . . by respected public figures in positions of official authority").

writing whether he would accept the Commissioner's conclusions. *Id.* at 316a.

On November 15, 2001, the Minister accepted the Commissioner's report in its entirety and certified as "the official position" of the Ministry that the size restriction had "***never had the force of law***"; that the egg-harvesting restriction had been retroactively repealed; and that the packaging rules had been invalidated when the authorizing statute was repealed. Pet. App. 315a-18a (emphasis in original). For the latter point, the Minister also relied on an "interpretive decree" that had been issued by the Honduran Congress in early November 2001. *Id.* at 317a. The Congress, which in Honduras's civil law system is the final interpretive legal authority, declared that the express repeal of a law automatically leaves without any legal effect the regulations promulgated to implement the repealed law, absent contrary provision in the repealing statute. *Id.* at 408a-09a. This decree squarely contradicted Ms. Paz's testimony, and it confirmed Mr. McNab's position that the repeal of the meat-inspection statute had also repealed the packaging regulations under which he was prosecuted.

Ms. Paz acquiesced in and countersigned the Minister of Agriculture's order "disqualify[ing] as an error of law" the views she had expressed as a prosecution witness. Pet. App. 316a, 318a. The Minister then directed all Ministry employees to abide by the legal conclusions set forth in the Minister's order. *Id.* at 322a-24a.

By diplomatic note dated January 23, 2002, the Honduran Embassy in the United States transmitted to the U.S. Department of State the documents reflecting the Minister's official actions, noting that their effect was to "find[] that the laws of Honduras were not violated by Mr. McNab" and "request[ing] that [they] be submitted as soon as possible to the Department of Justice for its consideration." Pet. App. 326a.

6. Mr. McNab appealed his conviction.[7] Through its Embassy in the United States, the Republic of Honduras participated as *amicus curiae* on Mr. McNab's behalf, submitting to the court a detailed opinion by the new Attorney General of Honduras, Sergio Zavala Leiva. The Attorney General—the sole "Legal Representative" of Honduras under that country's constitution—explained that Mr. McNab had violated no valid Honduran law. Pet. App. 257a-71a, 417a. With the benefit of the post-trial developments, the Attorney General concluded, among other things, that the size regulation was void *ab initio*, because it was never validly promulgated; that the lobster-egg statute had *never* covered the harvesting of egg-bearing lobsters; and that the packing regulations necessarily became void in 1995, when the underlying statute was repealed. *Id.* at 265a-71a. He also noted that Ms. Paz lacked any legal authority or competence to opine on the meaning of Honduran law on behalf of Honduras, and that her conduct in testifying was a violation of Honduran law and of Honduran due process. *See id.* at 262a-64a.

a. Nevertheless, a divided panel of the Eleventh Circuit affirmed, concluding that *all three* regulations were valid during the time period covered by the indictment. Pet. App. 34a.[8] To reach this conclusion, the panel was obliged to reject Mr. McNab's contention that the court should defer to

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[7] During the initial appellate briefing, the defendants returned to the district court with requests for judicial notice and for a new trial, raising post-trial developments described above. These motions were denied and the defendants filed new appeals, which were consolidated with the original appeals. Pet. App. 9a n.12.

[8] The court of appeals recognized at the outset of its discussion of the foreign-law issues that, because the jury returned a general verdict, "if *any* of the three Honduran laws that the defendants challenge were invalid during the time period covered by the indictment, the defendants' convictions must be reversed." Pet. App. 19a & n.22 (emphasis added).

the Honduran government's official interpretation of its own laws. *Id.* at 20a-24a. The majority gave two reasons for its conclusion.

First, the majority stated that it could not agree "that the Honduran Embassy's position is determinative" because the Executive Branch of the United States—*i.e.*, the officials charged with *prosecuting* Mr. McNab—had "taken the position that the various Honduran laws in issue are valid" and thus "had declined to accept the position of the Honduran Embassy." The court thought that the "political question" doctrine prevented it from disagreeing. Pet. App. 90a n.24.

Second, the majority asserted that the Honduran government had "changed" its position during the litigation, and reasoned that "finality" and the possibility that foreign governments will be corruptly influenced to undermine U.S. prosecutions left the court "free to follow" the "original" position presented by Ms. Paz. Pet. App. 20a-24a & n.25.[9] Emphasizing that the district court and the government had "rel[ied] upon [the] representations" of Ms. Paz and of Honduran enforcement agents, and having decided that no defer-

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[9] The court explained:

> There must be some finality with representations of foreign law by foreign governments. Given the inevitable political changes that take place in foreign governments, if courts were required to maintain compliance with a foreign government's position, we would be caught up in the endless task of redetermining foreign law.
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> . . .
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> . . . *Although such is not the case here*, it is not difficult to imagine a Lacey Act defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials to invalidate a particular law . . . .

Id. at 23a-24a (emphasis added).

ence was due to the official position of the Honduran Embassy, the Eleventh Circuit examined each issue by itself and—drawing heavily on the discredited theories proffered by Ms. Paz—agreed with the prosecution in all respects. *Id.* at 21a-22a & n.25.

b. Judge Fay dissented. Pet. App. 35a-43a. He rejected the notion that Honduras had "'shifted' its position" as "simply not accurate," *id.* at 35a, 42a, and pointed out that the majority had equated the views of lower-level officials with the authoritative interpretation that had since become available:

> There was no one official voice for the government of Honduras [in the district court]. But, there is now. The Honduran courts have ruled and the Honduran Embassy has filed an *amicus* brief advising us of the Honduran government's position . . . . That is the *only* official government position I am aware of in this record.

Id. at 36a (emphasis in original). Judge Fay sharply took issue with the majority's portraying the process by which Honduras arrived at its position as "akin to something sinister"; in fact, Judge Fay stated, the identical process "occurs routinely in our country." *Id.* at 42a.

Judge Fay also pointed out that despite the importance of finality as a general notion, "in the context of an invalidated substantive criminal law which forms the basis of a criminal prosecution or conviction, [the majority's] reliance on the concept of finality is misplaced." Pet. App. 41a. Even if there had been a "change" in the law, Honduran and American law both require that a change in law be applied retroactively to a defendant whose conviction is still pending on appeal, Judge Fay explained. *Id.*

7. Mr. McNab sought rehearing on numerous grounds. The panel granted rehearing in part, solely to delete the parts of its opinion that "deferred" to the prosecution's interpretation of Honduran law. The court made no other changes and refused to reconsider Mr. McNab's conviction notwithstand-

ing the considered views of the Honduran government, which filed an additional brief advising the en banc court of its official position. Judge Fay again dissented. *See* Pet. App. 78a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's amended opinion cites, as the sole remaining basis for the court's failure to credit the Republic of Honduras's official interpretation of its own laws, a supposed principle of "finality" that is premised on the assumption that foreign governments are uniquely susceptible to "inevitable political changes" or corrupt influences from individuals "with means and connections" (Pet. App. 23a-24a), and that such presumed instability and venality renders the legal interpretations proffered by such governments inherently suspect. This misguided reasoning conflicts with the decisions of this Court, and with the decisions of other federal courts.

First, the Eleventh Circuit is alone among the courts of appeals in refusing to accord deference to the construction of foreign law adopted by the authorized representatives of the foreign state. Several other circuits have considered the question, and they agree that deference ordinarily must be accorded to the foreign nation's interpretation. Second, this Court and other circuits have consistently presumed the propriety and regularity of the official acts of foreign governments. By resting its rule of "non-deference" on its unjustified—and, in this case, concededly unsupported—presumption that foreign governments are especially susceptible to instability or corrupt influences, the Eleventh Circuit directly contravened this principle. Finally, the Eleventh Circuit imposed its "finality" principle before Mr. McNab's conviction had become final. By denying Mr. McNab the benefit of the current law while his direct appeal was still pending, the court reached a result incompatible with this Court's holdings and raised a due process question on which this Court

has granted certiorari in recent years but never squarely resolved.

I. The Decision Below Is Contrary To The Holdings Of This Court And Other Federal Courts On Important And Recurring Issues

Almost two hundred years ago, Chief Justice Marshall observed:

> [N]o Court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the Courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the Courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute.

Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 159-60 (1825). In this case, the Eleventh Circuit clearly "depart[ed] from th[e] construction" given to Honduran law by Honduran officials undoubtedly empowered to speak authoritatively as to the meaning of their own laws, and from the approach unanimously followed by other courts of appeals. The conflict created by the decision below clearly warrants resolution by this Court.

A. Other Circuits Unanimously Hold That A Foreign State's Interpretation Of Its Own Laws Is Entitled To Deference

Every circuit but the Eleventh that has been faced with an issue of foreign law and has had the benefit of the authoritative views of the nation in question has accorded those views considerable, even conclusive, weight. Indeed, courts of appeals have deferred to the official views of the foreign state even when those official views change in the course of the

litigation or when the foreign country submits a construction that is markedly in the country's own self-interest—neither of which occurred here.

1. In *Riggs National Corp. v. Commissioner* ("*Riggs I*"), 163 F.3d 1363 (D.C. Cir. 1999), the D.C. Circuit considered the deference issue in a context similar to the one presented here—the impact of a foreign government official's interpretation on a U.S. statute that incorporates foreign law—but reached precisely the opposite conclusion. A corporation paying federal tax on foreign-derived income may credit against its tax liability the amount of any foreign taxes it has paid. 26 U.S.C. § 901. Riggs Bank had made a series of loans to the Central Bank of Brazil; the Central Bank not only paid Riggs interest on the debt but also paid Brazil, on Riggs's behalf, the amount of Riggs's tax liability on the interest income. The IRS contended, however, that Riggs could not deduct the Brazilian tax payments, because any interest income that Riggs received from a government entity (*i.e.*, the Central Bank) was not taxable under Brazilian law. The position of the IRS was supported by an opinion from the Supreme Court of Brazil, but was flatly contrary to a private letter ruling by the Brazilian Minister of Finance, who had concluded that taxpayers in Riggs's position *were* obliged by law to pay the tax. 163 F.3d at 1365-66.

Reversing the Tax Court's decision for the IRS, the D.C. Circuit noted first that Brazil is a civil law country that does not follow the rule of *stare decisis*, and thus the Brazilian Supreme Court's opinion in a different case was not controlling. Instead, the court found the ruling by the Finance Minister dispositive. 163 F.3d at 1366. A reexamination of the legal sufficiency of that ruling, the court held, would violate the act of state doctrine, since the reexamination would effectively treat the Minister's actions as "invalid" and "[t]he act of state doctrine requires courts to abstain from even engaging in such an inquiry." *Id.* at 1368. Rejecting the Service's claim that the case involved a mere "interpretation of law"

that was "not the type of act of state contemplated by the doctrine," the court noted that the Minister's order had legal force in Brazil—he had ordered the Central Bank to pay the tax and his decision would bind other, similarly situated taxpayers. *Id.* at 1367-68.

Notably, the D.C. Circuit deferred to the Minister's view even though it *contradicted* not only the views of the Brazilian Supreme Court, but also an earlier ruling by the Brazilian Revenue Service. *See* 163 F.3d at 1366. The Minister, however, was "the highest-ranking Brazilian authority on tax matters," and his ruling on Riggs's obligation to pay was the "definitive" word on the matter. *Id.* That the superior official had countermanded lower-ranking officials' decision did not trouble the D.C. Circuit, which noted that, "*as in the United States*, the revenue service might be persuaded to change its view." *Id.* (emphasis added).

In *Riggs I*, as in this case, the authoritative opinion ultimately offered by the highest-ranking relevant official of the foreign government differed from the opinion initially reached by lower-level officers; in this case, however, the highest-ranking officials' interpretation received *no* deference precisely *because* it differed from the views expressed by Ms. Paz, a lower level functionary who had *no* legal authority to speak to the issue on behalf of Honduras. And, in this case as in *Riggs I*, the rulings and opinions of the responsible officers whose views were rejected by the Eleventh Circuit (the Minister of Agriculture's ruling, the Attorney General's formal opinion, and the Honduran Congress's interpretive decree) indisputably have binding effect within Honduras. *See, e.g.*, Pet. App. 318a (order to Ministry of Agriculture employees). By eschewing the approach followed by the D.C. Circuit, the Eleventh Circuit effectively declared "invalid" those rulings and opinions.

Like the D.C. Circuit, the Ninth Circuit has held that a federal court may not second-guess a foreign state's construction of its own law without implicating the act of state

doctrine. In *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468 (9th Cir. 1992), the court was required to ascertain whether Chinese law blocked a discovery request. Applying principles similar to those of *Riggs I*, the Ninth Circuit gave categorical deference to the Chinese government's view.

In *Richmark*, Beijing Ever Bright Industrial Co. ("Beijing"), a company owned by the People's Republic of China (PRC) and operating as "an arm of the PRC government," defaulted on a claim in a U.S. court and faced demands for discovery to identify its assets for collection purposes. 959 F.2d at 1471-72. Beijing refused to comply with the discovery request (and was held in contempt) after being instructed by the "Ever Bright Group," a government agency that oversaw Beijing's operations, that PRC state-secrecy laws precluded disclosure of most of the information sought. *Id.* at 1472-73. On appeal, the Ninth Circuit accorded categorical deference to the Ever Bright Group's determination of PRC law, holding that it "ha[d] neither the *power* nor the *expertise* to determine for [itself] what PRC law is," and that it could not contradict the PRC's interpretation without implicating the act of state doctrine. *Id.* at 1474 & n.7 (emphasis added). Given the conflict between the U.S. litigation and the foreign law, the court proceeded to balance the national interests involved, as this Court's cases require,[10] and decided that the balance tipped in favor of compelling discovery against Beijing. *Id.* at 1478-79.[11]

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[10] Under this Court's decisions, a court in such a situation examines first whether the foreign law does bar compliance with the discovery order, and then whether any sufficiently weighty countervailing interest justifies compelling discovery nonetheless. *See Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 nn.28-29 (1987).

[11] Notably, the Ninth Circuit has deferred to the views of foreign legal officials even after those officials have ostensibly

2. The Second, Fifth, and Seventh Circuits have also held—citing the considerations that this Court has invoked in deferring to administrative agencies and state executive officials—that federal courts generally must defer to a foreign government's construction of its own laws.

In the leading case in this line, *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (per curiam), the Seventh Circuit deferred to the French government's interpretation of an aquatic-pollution law. After a catastrophic spill from an oil tanker off its coast, France sued Amoco to recoup pollution damages and the costs of cleanup, including the expense incurred due to oil that washed ashore. *Id.* at 1288-89. The scope of Amoco's potential liability turned on the interpretation of a French statute authorizing the government to incur cleanup costs and seek reimbursement from the vessel owner: Amoco argued that this authority did not extend to costs associated with oil that drifted ashore, while

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changed their *own* interpretations, as opposed to overruling the unauthorized opinion of a subordinate as in this case. In *Kaho v. Ilchert*, 765 F.2d 877 (9th Cir. 1985), two applicants' eligibility for visas turned on whether their sponsor had become their parent through a "customary adoption" in the Kingdom of Tonga. The Tongan Crown Solicitor had submitted a letter that convinced federal courts, and the Board of Immigration Appeals, that Tongan law did not recognize customary adoptions. *E.g.*, *Mila v. Dist. Director*, 678 F.2d 123, 125-26 (10th Cir. 1982); *Matter of Palelei*, 16 I. & N. Dec. 716, 718 (1979). However, the Crown Solicitor subsequently revised his views in a second letter, stating that customary adoptions *do* create a parent-child relationship under Tongan law. *Kaho*, 765 F.2d at 883. Although the BIA refused to change its position in light of the Crown Solicitor's second letter, the Ninth Circuit held that analysis "unsound," because the second letter demonstrated that the Crown Solicitor had "retracted his original conclusion" and the revised position, bolstered by other evidence, correctly stated Tongan law. *Id.* at 884 (disagreeing with *Matter of Fakalata*, 18 I. & N. Dec. 213, 216-17 (1982)).

France contended that the statute permitted it to recover all such costs. *Id.* at 1311-12.

The Seventh Circuit rejected Amoco's contention and accepted France's view, despite the law's ambiguity and the competing testimony by "expert[s] of the highest skill and repute supporting [each side's] interpretation." 954 F.2d at 1312. Despite France's financial interest in the outcome, the court ruled that France's construction of its own law was dispositive:

> If all of the litigants were private parties, we would need to decide whether [the broader] understanding of the law is correct. But the Republic of France appears in this court and assures us that Article 16 applies to oil that reaches shore. . . . *A court of the United States owes substantial deference to the construction France places on its domestic law.*

Id. (emphasis added). The Seventh Circuit explained that federal courts routinely defer both to state or local government officials construing the law of their jurisdictions and to federal administrative agencies construing the statutes and regulations they administer. "Giving the conclusions of a sovereign nation less respect than those of an administrative agency," the court noted, "is unacceptable." *Id.*

The Second Circuit followed a similar approach in *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003), where the court accorded deference to the Indonesian government's construction of that nation's property law—again, despite that government's obvious pecuniary interest in the outcome. Karaha Bodas Co. had obtained judgment on an arbitral award against the defendant oil and gas company ("Pertamina"), which was owned and controlled by the Republic of Indonesia. Seeking to enforce that judgment, Karaha Bodas levied on several trust accounts in New York holding revenues from Pertamina's operations.

Under the Foreign Sovereign Immunities Act and New York law, however, those revenues could be attached only if they were the property of Pertamina and not the Republic of Indonesia. *Id.* at 83. Determining the dispositive question of ownership required resort to Indonesian property law. *Id.* at 88.

The Second Circuit agreed with the construction of Indonesian law advanced by Pertamina and the Indonesian Ministry of Finance, which joined Pertamina's appeal. *Karaha Bodas*, 313 F.3d at 81-82, 92. In rejecting Karaha Bodas's alternative interpretation, the court agreed "with other Courts of Appeals that have suggested that a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Id.* at 92 (citing *Amoco Cadiz*, 954 F.2d at 1312, and *Access Telecom, Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999)). The court concluded, "Where a choice between two interpretations of ambiguous foreign law rests finely balanced, the support of a foreign sovereign for one interpretation furnishes legitimate assistance in the resolution of interpretive dilemmas." *Id.* The court accordingly adopted Indonesia's preferred construction. *Id.*

The Fifth Circuit has also accepted a view of deference patterned after the Seventh Circuit's analysis. *Access Telecom*, 197 F.3d at 713-14. Considering an antitrust action that required it to ascertain the legality of one party's business under Mexican law, that court held that, "[r]ecognizing the difficulty of interpreting foreign law, courts may defer to foreign government interpretations" of that law. *Id.* at 714 (citing and favorably discussing *Amoco Cadiz*, 954 F.2d at 1312). Relying on that principle, the defendants in *Access Telecom* had sought deference for an "official circular" issued by the Mexican Secretary of Communications and Transportation (SCT). The Fifth Circuit concluded, however, that deference was not appropriate, because neither the Republic of Mexico nor the SCT had appeared "before this

court" and, in any event, there was no showing that the SCT was "empowered to interpret"—not just "to enforce"—Mexican law. *Id.*

Finally, long before cases such as *Amoco Cadiz* and *Riggs I*, the Court of Customs and Patent Appeals—whose decisions bind the Federal Circuit, *see South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982) (en banc))—explicitly invoked Chief Justice Marshall's opinion in *Elmendorf* in support of a strong principle of deference. *See United States v. Pillsbury Flour Mills Co.*, 96 F.2d 854, 859-60 (C.C.P.A. 1938). The court in *Pillsbury* found dispositive the construction of Cuban tax law by that nation's (pre-Castro) executive authority, and it expressly rejected a lower court's assertion that, under *Elmendorf*, only *judicial* constructions of foreign law may receive deference. *See id.* at 858-60. Rather, the court wrote, the construction of a foreign country's law by that nation's "high officials" is "not susceptible of correction by [U.S.] courts." *Id.* at 859. The court concluded that "[s]ince the Cuban Government itself has construed its own law . . . as it affects its own internal affairs, that construction should be accepted as to the issue here involved." *Id.* at 860.

B. While The Majority Rule Of Deference Is Supported By This Court's Decisions, The Eleventh Circuit's Rationale Conflicts With Decisions Of This Court And Other Federal Courts

Each of the rationales on which courts adhering to the majority rule have relied—whether based on expert familiarity or on international comity—are soundly rooted in this Court's cases. Indeed, this Court's deference cases, from *Elmendorf* forward, teach that when a federal court lacks expertise in interpreting the law in question, when the court is presented with a construction of the law by an actor or body that is specifically authorized to interpret or implement the law, and when the consequences of the court's rejecting that

construction—such as a negative impact on foreign relations—are particularly severe, the court generally must defer.

1. This Court has repeatedly cautioned federal courts to tread lightly in areas with which their familiarity is limited and in which a government official or agency possesses relevant expertise. *See, e.g.*, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) (federal agency); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (local government officials); *see also Lambert v. Wicklund*, 520 U.S. 292, 301 (1997) (per curiam) (Stevens, J., concurring in the judgment) (construction of Montana law proffered by Montana's attorney general).[12] Certainty, predictability, and consistency in the law are undercut when comparatively inexpert judges impose their own constructions in preference to the interpretation proffered by bodies with much greater expertise. *Amoco Cadiz*, 954 F.3d at 1312-13 (citing *Chevron* and *Frisby*); *accord Richmark*, 959 F.2d at 1474 n.7 (stating that the court lacked "the expertise to determine for [itself] what PRC law is").[13]

Deference is all the more appropriate where the interpretation proffered by a foreign government reflects the law as the

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[12] *Accord Stinson v. United States*, 508 U.S. 36, 44-45 (1993); *see also Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) ("[W]e must . . . give deference to an [expressive] association's view of what would impair its expression"); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (deferring to judgments of state and local educational institutions).

[13] The case for crediting a foreign government's interpretation is strongest where, as here, Congress has expressly made foreign or State law a distinct element that must be proved; by directly incorporating foreign and state law into federal law, Congress itself presumably intended that courts accord deference to the policymaking expertise and interpretive judgment of States and other nations. *Compare United States v. Mead Corp.*, 533 U.S. 218, 227-29 (2001).

relevant organs of that government have determined that it must be understood and enforced within that country—which almost invariably will be the case where, as here, the foreign country proffers the views of its highest officials through its embassy in the United States. In those circumstances, a federal court's rejection of the proffered construction necessarily and impermissibly "declare[s] invalid the official act of a foreign sovereign performed within its own territory," *W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 405 (1990), as the D.C. Circuit correctly recognized. *Riggs I*, 163 F.3d at 1368; *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Here, for example, the Eleventh Circuit held that the United States may prosecute a Honduran citizen for violating Honduran law even though that nation could *not* penalize Mr. McNab or any other Honduran citizen for precisely the same conduct. *See* Pet. App. 318a (Minister of Agriculture's direction to all Ministry employees to abide by precisely the same construction of Honduran law that the Eleventh Circuit thought incorrect); *id.* at 268a (Attorney General's opinion).

Notably, the circuits applying the majority rule have found these considerations of expertise and comity sufficiently compelling to outweigh any concern that a foreign state may be biased or self-interested. For example, several circuits have deferred to the legal views of foreign governments even when those governments stand to profit, as did the PRC's subsidiary company in *Richmark*, Indonesia's in *Karaha Bodas*, and France itself in *Amoco Cadiz*. Similarly, in *Riggs I* the D.C. Circuit did not dispute the IRS's view that "the Brazilian government's action" was "particularly vexing" and "opportunistic," or that it amounted to giving Brazil's Central Bank "virtually 'a free lunch'—at the American Treasury's expense." 163 F.3d at 1369. In this case, by contrast, the representation that warrants deference is based solely on Honduras's interests in ensuring that its established

processes for error-correction are respected and in preserving the consistent application of its law to its own citizens.

2. The Eleventh Circuit's refusal to defer to the official views of Honduras not only conflicts with the approach followed by other circuits, but also is based on reasoning that itself conflicts with this Court's and other circuits' cases. Because the Eleventh Circuit abandoned on rehearing its initial (and plainly erroneous) theory of "deference" to the prosecutors, its decision now rests solely on a purported "finality" principle that freezes the law at the trial stage in order to safeguard prosecutions from the instability or corruption of foreign countries. That rationale squarely contradicts this Court's cases.

This Court explained as long ago as 1845 that U.S. courts must presume that the actions of foreign government officials are free from malign influence. In *United States v. King*, 44 U.S. (3 How.) 773 (1845), this Court considered a property transfer whose validity turned on whether a certificate by a colonial surveyor-general acting on behalf of Spain had been procured by fraud. *See id.* at 785. The Court agreed that "it is inconsistent with the comity due to the officers of a foreign government, to impute to them fraud, or connivance in a fraud, in an official act where their conduct has not been questioned by the authority under which they were acting." *Id.* at 785-86. This is particularly true where the foreign sovereign's own interests, or its citizens', are at stake, but even "as regards the interests of others, the acts of the officer, in the line of his duty, will *prima facie* be considered as performed honestly, and in good faith." *Id.* at 786; *cf. Kirkpatrick*, 493 U.S. at 409 ("The Act of State doctrine . . . requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

Other federal courts have consistently applied this presumption of regularity to the actions of foreign officials. In a subsequent appeal in the *Riggs* case, for example, the D.C. Circuit adhered to *King*, holding that the presumption "ap-

plies to the actions and records of foreign public officials" and required the IRS to presume from foreign records, absent evidence to the contrary, that taxes had been paid on Riggs's behalf. *Riggs Nat'l Corp. v. Comm'r* ("*Riggs II*"), 295 F.3d 16, 20-21 (D.C. Cir. 2002); *accord Murarka v. Bachrack Bros.*, 215 F.2d 547, 552-53 (2d Cir. 1954) (Harlan, J.) (presuming, absent contrary proof, the validity of an Indian vice consul's "determination . . . that the plaintiffs were Indian citizens" and citing *King*, 44 U.S. (3 How.) at 784-86); *see also Monaco v. Dulles*, 210 F.2d 760, 763 (2d Cir. 1954) (Italian military authorities).

Although the presumption of regularity may be rebutted by "clear and specific evidence," *Riggs II*, 295 F.3d at 21; *see King*, 44 U.S. (3 How.) at 785-86, there is no basis for rebutting the presumption here. Even if the Eleventh Circuit were correct in positing a "change" in Honduras's official position (and, as Judge Fay explained, it was not, *see* Pet. App. 35a-36a), that would scarcely be irregular or untoward. As both Judge Fay and the D.C. Circuit noted, agencies in this country often, and appropriately, change their legal positions. *Id.* at 42a; *Riggs I*, 163 F.3d at 1366. In fact, this Court has frequently vacated lower-court judgments based on the Solicitor General's conclusion that the litigating position urged by the government below either cannot be defended or must be modified in light of intervening developments. *E.g.*, *Lawrence v. Chater*, 516 U.S. 163, 165-66 (1996) (per curiam).[14]

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[14] *See also, e.g.*, *Brown v. United States*, 123 S. Ct. 1928 (2003) (mem.); *Price v. United States*, 123 S. Ct. 986 (2003) (mem.); *Hohn v. United States*, 537 U.S. 801 (2002) (mem.); *Jackson v. Massanari*, 534 U.S. 801 (2001) (mem.); *Raquel v. Educ. Mgmt. Corp.*, 531 U.S. 952 (2000) (mem.); *Hoover v. United States*, 519 U.S. 1052 (1997) (mem.); *Goffer v. West*, 519 U.S. 1052 (1997) (mem.); *Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (mem.); *Stephens v. Rubin*, 516 U.S. 1037 (1996) (mem.); *Stutson v. United States*, 516 U.S. 193, 195-96 (1996) (per curiam).

Not surprisingly, the Eleventh Circuit admitted that there was no indication *in this case* that anything untoward had motivated the legal conclusions that Honduras's highest authorities had reached. Pet. App. 24a. Rather, the court of appeals relied on a hypothetical danger of instability or corruption to justify imposing a rule of "finality" *in all cases*. That approach cannot be reconciled with *King* or with the decisions of other circuits that have followed *King*.

C. The Foreign Deference Question Is Significant And Arises Frequently In Federal Courts

The U.S. Code is littered with statutes that, like the Lacey Act or the Tax Code provision at issue in *Riggs*, require interpretation of foreign law.[15] In immigration law, for example, foreign law often determines the validity of a marriage, the effectiveness of an adoption, or the legitimacy of a child. *See supra* n.11. Federal rules of procedure also often require resort to foreign law when an international party is involved. *E.g.*, *Volkswagenwerk AG v. Schlunk*, 486 U.S. 694, 704

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[15] *See, e.g.*, Tariff Act of 1930, § 527(a), 19 U.S.C. § 1527(a) (prohibiting the importation of any wild mammal or bird "[i]f the laws or regulations of any country" forbid it); Marine Mammal Protection Act of 1972, § 102(c), 19 U.S.C. § 1372(c) (similar, for marine mammals); National Stolen Property Act, 18 U.S.C. § 2315 (prohibiting importation or transportation of "stolen" goods); *United States v. Schultz*, 333 F.3d 393, 400-01 (2d Cir. 2003) (determining under Egyptian law whether goods were "stolen" for purposes of § 2315); 26 U.S.C. §§ 404A, 841, 901, 907; Age Discrimination in Employment Act of 1967, § 4(f)(1), 29 U.S.C. § 623(f)(1) (no liability if compliance with the ADEA would violate foreign law); *Mahoney v. RFE/RL, Inc.*, 47 F.3d 447 (D.C. Cir. 1995) (applying this provision and holding that failing to adhere to an early retirement age specified in a collective bargaining agreement would violate German law); *see also, e.g.*, 42 U.S.C. § 1705(a); Death on the High Seas Act § 4, 46 U.S.C. app. § 764; 49 U.S.C. §§ 41313, 44102(a).

(1988) (service of process); *Société Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 202, 204 (1958) (foreign discovery-blocking statutes); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (*forum non conveniens*). And, of course, foreign law may simply provide the rule of decision in a civil action under choice of law principles or resolve an ancillary aspect of such a case. *E.g.*, *Karaha Bodas*, 313 F.3d at 85-86; *Amoco Cadiz*, 954 F.2d at 1310-11. As the reported cases demonstrate, foreign governments frequently express to American courts their official views on questions controlled by the law of their respective countries. Indeed, this Court has frequently received, and apparently accepted, such representations itself. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 98-100 & n.4 (2002); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-800 (1993). Plenary review by this Court is clearly warranted to resolve the conflict over the appropriate standard of deference to be paid to the foreign nation's views in such cases.

II. The Eleventh Circuit's Holding That Foreign Law Becomes "Final" Before The Conclusion Of Direct Appellate Review Cannot Be Squared With Due Process Protections

Under the Due Process Clause, no conviction is valid unless each and every element of the offense is proven to a jury, beyond a reasonable doubt. *E.g.*, *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970). An equally "basic norm[] of constitutional adjudication" is the guarantee that, until the conclusion of direct review—*i.e.*, until the conclusion of certiorari proceedings in this Court, *Clay v. United States*, 123 S. Ct. 1072, 1076 (2003)—a conviction is not yet "final" and must be reexamined in light of any intervening changes in the law. *Griffith v. Kentucky*, 479 U.S. 314, 322, 328 (1987); *see Powell v. Nevada*, 511 U.S. 79, 84 (1994). Indeed, even *after* a conviction becomes "final" under this Court's cases, a

defendant must receive the benefit of any subsequent authoritative interpretation that makes clear that the conduct proven at trial did not, in fact, satisfy the elements of the offense of conviction. *See Bunkley v. Florida*, 123 S. Ct. 2020, 2021, 2023 (2003) (per curiam); *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam).

Honduras is a civil law country in which the final authority to interpret the laws rests with the Congress, rather than with the courts as in a common law system, and in which the Attorney General is the country's sole "Legal Representative." Pet. App. 257a, 408a, 416a-17a. Thus, the interpretations of the Congress and the Attorney General, which demonstrate that Mr. McNab violated no Honduran law and hence no U.S. law, are equivalent to the state-court decisions refining the elements of the offense that this Court found to warrant relief in *Fiore* and *Bunkley*—even *after* the convictions in those cases had become final. Indeed, even if the Eleventh Circuit were correct in characterizing all the post-trial developments as a "change" in Honduran law, both United States and Honduran law would require that those "changes" be applied in this case, where the criminal conviction is under direct review and thus not "final": under the *Honduran* Constitution, changes in the law that benefit the accused in a criminal prosecution must be given retroactive effect (Pet. App. 415a), and the settled *American* rule is that (even apart from the controlling retroactivity principles derived from *Griffith* and its progeny) changes to penal statutes operate retroactively absent contrary legislative direction, *see, e.g.*, *Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809).

Moreover, if there were any merit to the Eleventh Circuit's novel declaration that "finality" forecloses reexamination on *direct* appeal of the correctness of foreign law determinations made by the trial court, this case would clearly present "the issue left open in *Fiore*" and not reached in *Bunkley* due to an ambiguous lower-court decision: whether

due process requires that a new interpretation of a statute of conviction be applied "retroactively," notwithstanding any principle of finality, if the new construction would exonerate the defendant. *Bunkley*, 123 S. Ct. at 2023. That important and unresolved question continues to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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October 24, 2003

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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

DAVID HENSON MCNAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MARCH 21, 2003
THOMAS K. KAHN
CLERK

No. 01-15148

D. C. Docket No. 00-00079-CR-1-RV

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

DAVID HENSON MCNAB,
ROBERT D. BLANDFORD, et al., Defendants-Appellants.

No. 02-10810

D. C. Docket No. 00-00079-CR-CB

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

ABNER SCHOENWETTER,

ROBERT D. BLANDFORD, Defendants-Appellants.

No. 02-11264

D. C. Docket No. 00-00079-CR-1-RV

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

DAVID HENSON MCNAB,
ABNER SCHOENWETTER, et al., Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

(March 21, 2003)

(As Amended May 29, 2003)

Before HULL, WILSON and FAY, Circuit Judges.

WILSON, Circuit Judge:

The Court hereby substitutes the following opinion in place of the opinion which was issued on March 21, 2003.

David Henson McNab, Abner Schoenwetter, Robert D. Blandford, and Diane H. Huang (collectively the defendants) appeal the convictions and sentences they received after a jury found them guilty of conspiracy, smuggling, money laundering, and Lacey Act violations in connection with the importation, sale, and purchase of Caribbean spiny lobsters from Honduras. The defendants' main argument on appeal is that the district court erred in determining that the Honduran laws that served as the underlying basis of their convictions were valid and enforceable. The defendants contend that the

Honduran laws were invalid, and, therefore, there was no violation of foreign law upon which to base their convictions.[1]

The defendants' challenge to the validity of the Honduran laws requires us to undertake our own foreign law determination. Our task is complicated by conflicting representations from Honduran officials regarding the validity of the Honduran laws. Throughout the investigation and trial, Honduran officials offered support and assistance to the United States government, and both the government and the district court relied upon the Honduran officials' verification of the Honduran laws. Shortly after the defendants were convicted, the Honduran government reversed its position; it currently refutes the validity of the laws it previously verified. Therefore, we must decide whether our courts are bound by a foreign government's new representations regarding the validity of its laws when its new representations are issued only post-conviction and directly contravene its original position upon which the government and our courts relied and the jury acted. This question is a matter of first impression in this Circuit and apparently the other circuits as well. For the reasons set forth below, we affirm the defendants' convictions and sentences.

---

[1] The Lacey Act prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." 16 U.S.C. § 3372(a)(2)(A). If the lobsters were not imported, transported, and sold in violation of Honduran law, there could be no Lacey Act violations. Accordingly, if the lobsters were brought into the United States legally and were not criminally-derived property, there could be no smuggling or money laundering violations.

BACKGROUND

On February 3, 1999, agents of the National Marine Fisheries Service (NMFS) received an anonymous facsimile, which provided that McNab's cargo transport vessel, the M/V Caribbean Clipper, would arrive in Bayou la Batre, Alabama on February 5, 1999, with a shipment of lobsters containing "undersized (3&4 oz) lobster tails, [which was] a violation of Honduran law." The facsimile further provided that Honduras prohibits the bulk exportation of lobsters and requires that lobsters be packed in boxes for export.

In response to the anonymous tip, NMFS agents consulted the Direccion General de Pesca y Acuicultura (DIGEPESCA) in Honduras[2] regarding the legality of the lobster shipment referenced in the facsimile. The NMFS agents questioned whether the shipment violated the Lacey Act, which makes it unlawful to import into the United States "fish or wildlife [that has been] taken, possessed, transported, or sold in violation of . . . any foreign law." 16 U.S.C. § 3372(a)(2)(A). In three separate letters responding to the agents' inquiry, the director general of the DIGEPESCA described some of Honduras's fishing laws and confirmed that McNab's shipment "ha[d] been illegally transported in violation of the Fishing Law, the Industrial and Hygienic Sanitary Inspection Regulation for Fish Products and Resolution No. 030-95." The director general provided authentic copies of the applicable laws and stated that the DIGEPESCA was ready to support all efforts by the government to prosecute persons who violate the Lacey Act.

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[2] The DIGEPESCA is the agency within Honduras's Secretaria de Agricultura y Ganaderia (SAG) that is responsible for the enforcement of the fishing laws and the execution of fishing programs.

In early March of 1999 NMFS agents seized the lobster shipment that was referenced in the anonymous facsimile based upon the director general's assurances that the lobsters had been exported in violation of Honduran law. Over the next few months, NMFS agents communicated with Honduran officials about the Honduran laws and the legality of the seized lobster shipment. In June of 1999 NMFS special agents and an attorney in the United States National Oceanic and Atmospheric Administration Office of the General Counsel met with various Honduran officials from the Secretaria de Agricultura y Ganaderia (SAG) in Tegucigalpa, Honduras. The minister, the vice minister, the director of legal services, the director of legal affairs, the secretary general of the SAG, the director general of the DIGEPESCA, and the legal advisor for the Servicio Nacional de Sanidad Agropecuaria (SENASA)[3] confirmed that the lobsters had been exported illegally without first being inspected and processed. Furthermore, the Honduran officials confirmed that there was a 5.5-inch size limit for lobster tails and that all catches had to be reported to Honduran authorities. The Honduran officials provided certified copies of the laws in question. In September of 1999 NMFS agents inspected the lobster shipment that had been seized earlier in the year. The inspection confirmed that the seized lobsters were packed in bulk plastic bags without being processed and revealed that a significant number had a tail length that was less than the 5.5 inches required by the Honduran size limit restriction. In addition, many of the lobsters were egg-bearing or had their eggs removed. In March of 2000 two Honduran officials, a legal advisor in the Despacho Ministerial and a SAG legal

---

[3] Like the DIGEPESCA, the SENASA is an agency within the SAG. The SENASA is responsible for the enforcement of hygiene laws and regulations.

advisor, traveled to Alabama to meet with government prosecutors and investigators. Both legal advisors provided written statements that cited Resolution 030-95 as a valid law regulating the lobster fishing industry. They also described the processing requirements mandated by Regulation 0008-93.[4] They further explained that Honduras prohibits the harvesting of egg-bearing lobsters.[5] Based upon the NMFS's investigation and the verification of the applicable foreign laws by the Honduran officials charged with regulating the lobster fishing industry, the government decided to prosecute the defendants for their roles in the illegal importing scheme. Subsequently, the grand jury returned a forty-seven-count second superseding indictment in September of 2000.[6] To determine the validity of the relevant Honduran laws, the district court conducted a pretrial hearing on foreign law in September of 2000. Most of the defendants' evidence at the hearing pertained to the validity of Resolution 030-95, which

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[4] Processing lobster tails involves several steps: thawing, sorting, and grading the lobsters by quality and size; placing the tails in individual plastic sleeves; and packing them in boxes.

[5] The legal advisors cited Resolution 003-80 as authority for the prohibition against harvesting or destroying egg-bearing lobsters. Resolution 003-80 is substantially similar to Article 70(3) of the Fishing Law, as both laws prohibit the harvesting or destruction of lobster eggs. At the foreign law hearing, the government acknowledged that it could not verify the publication of Resolution 003-80 in La Gaceta and therefore relied upon Article 70(3) as a Lacey Act predicate.

[6] Although the investigation focused initially upon the seized shipment referenced in the facsimile, the indictment charged the defendants with violations based upon numerous shipments of lobsters between 1996 and 1999.

established a 5.5-inch size limit for lobsters.[7] At the government's request, the minister of the SAG sent Secretary General Liliana Patricia Paz, the SAG's highest-ranking legal official, to testify at the foreign law hearing. Secretary General Paz testified as to the validity of various laws and confirmed that Resolution 030-95, Regulation 0008-93, and Article 70(3) of the Fishing Law[8] were in effect and legally binding during the time period covered by the indictment. She also explained the means by which a Honduran citizen may seek the invalidation of a resolution in Honduras,[9] and she testified that no such proceeding regarding Resolution 030-95 had been initiated at that time. Persuaded by the testimony of Secretary General Paz, the district court found that the government met its burden of establishing the validity of the Honduran laws that served as the predicates for the Lacey

---

[7] Two law professors, both experts in Honduran law, testified for the defendants. The defendants also submitted a number of legal opinions from members of the Honduran legal community, including the attorney general of Honduras and the regional prosecutor of the Fiscalia Especial Para la Defensa de la Constitución, and a declaration from a practicing Honduran attorney.

[8] The Fishing Law is a comprehensive statute regulating the Honduran fishing industry. *See* Decreto No. 154, May 19, 1959, La Gaceta, June 9, 1959.

[9] The Honduran judicial system includes a separate administrative law court system in which disputes relating to administrative matters are adjudicated. Among the procedures available in the administrative court system is an action by a Honduran citizen who claims to be affected adversely by some administrative rule to seek a declaration that the rule is invalid. Such an action is first brought in the Honduran Court of the First Instance of Administrative Law. Decisions from that court may be appealed to the Honduran Court of Appeals for Administrative Law.

Act charges. Shortly after the foreign law hearing, a jury trial was conducted, and the defendants were found guilty on multiple counts.[10]

After the trial, the defendants filed a number of motions seeking to have their convictions overturned.[11] In the motions, they attacked the validity of the foreign laws underlying their convictions, citing recent developments in Honduran law. In preparation for a hearing on the motions, an official from the United States Department of Justice and agents from the NMFS and the Federal Bureau of Investigation traveled to Honduras in early August of 2001 to discuss the defendants' challenges to the validity of the Honduran laws. They received affidavits from three Honduran government officials, including Secretary General Paz, confirming the validity of the laws the defendants were challenging. They also received an affidavit from the minister of the SAG, stating that those Honduran government officials were authorized to provide advice on the enforcement and validity of the laws. After the hearing, the district court dismissed each of the defendants' posttrial motions. Thereafter, in August of 2001, the district court sentenced McNab, Blandford, and

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[10] McNab was found guilty of conspiracy, smuggling, and money laundering. Blandford was found guilty of conspiracy, smuggling, Lacey Act violations, and money laundering, as well as two lesser included offenses under the Lacey Act. Schoenwetter was found guilty as charged for conspiracy and smuggling, and Huang was found guilty as charged for conspiracy, Lacey Act violations, and false labeling.

[11] The final set of motions included a motion to dismiss because the indictment failed to charge a crime, a motion for a new trial based upon newly discovered evidence, and a motion for redetermination of foreign law based upon developments in Honduran law.

Schoenwetter to ninety-seven months of imprisonment and Huang to twenty-four months of imprisonment.

After sentencing, the defendants appealed their convictions based, in part, upon their contention that the Honduran laws used as the predicates for the Lacey Act convictions were invalid or void during the time period covered by the indictment.[12] In December of 2001 a government attorney and NMFS agents traveled to Honduras to discuss the defendants' new documents with Honduran officials to prepare the government's brief on appeal. Once again, the Honduran officials confirmed their prior statements regarding the validity of the Honduran laws.

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[12] After the initial notice of appeal, the defendants obtained additional support for their claim that the district court misinterpreted Honduran law. As a result, they filed a Motion for Judicial Notice, as well as alternative motions regarding newly issued Honduran legal opinions with this Court. We denied those motions without prejudice and held that the motions could be renewed if the district court refused to certify its intention to grant a new trial pursuant to *United States v. Ellsworth*, 814 F.2d 613 (11th Cir. 1987) (per curiam).

Based upon our order, in January of 2002 McNab filed a Motion for Order Certifying Intention to Grant New Trial Upon Remand with the district court, which was subsequently adopted by Blandford, Schoenwetter, and Huang. After initially denying the motion, the district court granted the defendants' motion for reconsideration. Upon reconsideration, the district court affirmed its earlier order that it would not certify its intention to grant a new trial. The defendants appeal that order and argue that the district court erred in denying the motion to certify its intention to grant a new trial upon remand. In light of our holding regarding the validity of the Honduran laws, we need not address this issue.

The defendants raise a number of issues in these consolidated appeals. First, they argue that the scope of the Lacey Act is limited to foreign statutes and that the Honduran resolutions and regulations listed in the indictment were used improperly as predicates for their convictions. Second, they contend that the district court's interpretation of the Honduran resolutions and regulations was erroneous and that the Honduran laws that served as predicates for the convictions were invalid. Third, McNab argues that the district court abused its discretion by excluding evidence at trial relating to his "knowledge" of Honduran law. Fourth, the defendants assert that the district court made several errors with respect to the jury instructions. Fifth, they contend that the jury's verdicts were based upon insufficient evidence. Finally, Schoenwetter and Blandford argue that the district court erred in failing to postpone their sentencing and in determining the length of their sentences.

DISCUSSION

I. Scope of the Lacey Act

The first issue we address is whether the phrase "any foreign law" in the Lacey Act includes foreign regulations and other legally binding provisions that have the force and effect of law. The defendants argue that the phrase "any foreign law" should be read to mean foreign statutes and not foreign regulations or provisions that are legally binding. According to their argument, Resolution 030-95 and Regulation 0008-93 do not fall within the scope of the Lacey Act, because they are not statutes.[13] They rely upon what they consider a

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[13] The parties do not dispute the following explanation of the Honduran legal framework:

> The Government of Honduras is a constitutional republic. Its legal system is generally under the continental or civil

[Footnote continued on next page]

distinction by Congress between "any law or regulation of any State" and "any foreign law." 16 U.S.C. § 3372(a)(2)(A). The defendants argue that by failing to include foreign regulations explicitly, Congress intended that only foreign statutes could serve as the basis for a foreign law Lacey Act violation.

In accordance with the plain meaning doctrine, "[w]e begin our construction of . . . [the Lacey Act] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc), *cert. denied*, 532 U.S. 1065 (2001); *United States v. Gilbert*, 198 F.3d 1293,

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[Footnote continued from previous page]

> law system . . . . [T]he Constitution is the supreme law of the Republic.
>
> The adoption of statutes in Honduras (issued as "Decrees") is the exclusive prerogative of the National Congress. At the same time, the Constitution . . . vests in the Executive Branch the exclusive authority to issue "Regulations[."] Regulations (issued in the form of "Acuerdos"—in English, "Accords" or "Decisions" or "Agreements") are general rules of conduct applicable to all who may be affected by them and they have the force of law. The Constitution provides that Regulations may be issued only by the President of the Republic with the co-signature of the Secretary of State. [sic] (*i.e.* Chief Minister) of the pertinent ministry. Both statutes and regulations become effective only when they are published in *La Gaceta*, which is the Honduran equivalent of the *Federal Register*.

Br. of Amicus Curiae of the Embassy of Honduras and the Asociacion de Pescadores del Caribe in Supp. of Def.-Appellant David Henson McNab at 8-9 (citations omitted).

1298 (11th Cir. 1999). It is well established that "[w]hen the words of a statute are unambiguous . . . [the] judicial inquiry is complete." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (first alteration in original) (internal quotation marks omitted); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). When, however, "the language is ambiguous or leads to absurd results, . . . [we] may consult the legislative history and discern the true intent of Congress." *United States v. Kattan-Kassin*, 696 F.2d 893, 895 (11th Cir. 1983).[14]

With this guidance in mind, we examine the language of the Lacey Act. The Lacey Act provides that "[i]t is unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. § 3372(a)(2)(A). The Act defines "law" as those "*laws* . . . which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants." 16 U.S.C. § 3371(d) (emphasis added).

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[14] We note that although a court may resort to extrinsic materials if the statutory language is ambiguous or if the interpretation causes absurd results, only the latter is a true exception to the plain meaning rule. *CBS Inc.*, 245 F.3d at 1227 ("Stating that ambiguity establishes an exception, instead of disestablishes the predicate for the rule, confuses things.").

Unfortunately, the statutory definition defines the word "law" by using the word "laws."[15] While the definition is helpful in determining what the "law" must regulate, it is silent as to whether "law" is restricted to statutes or includes regulations and other provisions that foreign governments use to promulgate legally binding rules. Thus, we turn first to the common usage or ordinary meaning of the word "law" to determine its plain meaning. *Cf. Consol. Bank, N.A. v. United States Dep't of the Treasury*, 118 F.3d 1461, 1464 (11th Cir. 1997) ("In the absence of a statutory definition of a term, we look to the common usage of words for their meaning."). "[T]o determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance." *See CBS Inc.*, 245 F.3d at 1223.

Merriam Webster's Collegiate Dictionary provides several definitions of law, including "a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority" and "the whole body of such customs, practices, or rules." *Merriam Webster's Collegiate Dictionary* 659 (Frederick C. Mish et al. eds., 10th ed. 1996). Under these broad definitions of the word "law," the phrase "any foreign law"

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[15] Section 3371(d) provides in full, "The terms 'law,' 'treaty,' 'regulation,' and 'Indian tribal law' mean laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants." 16 U.S.C. § 3371(d).

We read the word "law" to refer to laws "which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants," and the word "treaty" to refer to treaties "which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants," and so forth.

incorporates the Honduran decrees and regulations at issue. *See United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 826 (9th Cir. 1989).

On the other hand, there are more narrow definitions of the word "law" that also are commonly used. *Black's Law Dictionary* provides several definitions of the word "law," including one that defines law simply as "[a] statute." *Black's Law Dictionary* 889 (Bryan A. Garner et al. eds., 7th ed. 1999). This definition is plausible when the phrase "any foreign law" is read in conjunction with the rest of § 3372(a)(2)(A). For example, the defendants assert that "any foreign law" can refer only to foreign statutes, because to read "any foreign law" to include regulations would render the word "regulation" in the earlier phrase "any law or regulation of any State" meaningless.[16]

While the defendants advocate this interpretation of the statute, it is not the only reasonable one. Another is that Congress intended to punish violations of state laws and state regulations and to punish violations of foreign laws, whatever form those foreign laws may take. The Ninth Circuit, in explaining why it interpreted "any foreign law" to cover different forms of foreign laws, emphasized how the world's diverse legal systems defy easy definition or categorization. It noted,

> [B]ecause of the wide range the forms of law may take given the world's many diverse legal and governmental systems, Congress would be hard-pressed to set forth a definition that

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[16] "A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage." *United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991).

> would adequately encompass all of them. . . . Thus, if Congress had sought to define "any foreign law" with any kind of specificity whatsoever, it might have effectively immunized . . . [conduct] under the Act despite violation of conservation laws of a large portion of the world's regimes that possess systems of law and government that defy easy definition or categorization.

594,464 Pounds of Salmon, 871 F.2d at 827–28. In other words, the argument is that Congress specifically chose to limit domestic law to statutes and regulations, but specifically chose to use the language "any foreign law" to cover the wide varieties of laws in foreign countries.

The net result is that there are several reasonable ways to interpret the word "law" in the phrase "any foreign law." As a result of this ambiguity, we look beyond the language of the statute to determine legislative intent. We thus now look to the legislative history of the Lacey Act to ascertain Congress's intent. *Fed. Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1239 (11th Cir. 2000). "In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments whether accepted or rejected and the remarks in debate preceding passage." *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980).[17] The Lacey Act was introduced by Representative John F. Lacey of Iowa in

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[17] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

1900. H.R. Rep. No. 97-276, at 7 (1981) (discussing the enactment of the Lacey Act). Representative Lacey recognized that individual states were unable to protect their wildlife, because their laws did not reach into neighboring states. *Id.* Thus, he asserted that a federal law was necessary to outlaw the interstate traffic in wildlife illegally taken from their state of origin.[18] *Id.* By 1981 Congress recognized the need to strengthen the Lacey Act in response to "the massive illegal trade in fish, wildlife and plants." 127 Cong. Rec. 17,327 (1981) (remarks of Senator Lincoln Chafee). Congress thus amended the Lacey Act in 1981 "to correct . . . insufficiencies" in the Act and "to simplify administration and enforcement."[19] S. Rep. No. 97-123, at 2 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1749.

Although there are certain parts of the legislative history of the Lacey Act that support the defendants' position to some extent, the legislative history reflects that "the [main] thrust of Congress's intention in amending the Act was to expand its scope and enhance its deterrence effect."[20]

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[18] In 1935 the Lacey Act was amended to include foreign law because of concern over the illegal marketing of wildlife from other countries. H.R. Rep. No. 97-276, at 7.

[19] The Lacey Act Amendments of 1981 combined the Lacey Act of 1900 and the Black Bass Act of 1926. 127 Cong. Rec. 26,537 (1981) (remarks of Representative John Breaux). The Black Bass Act was similar to the Lacey Act in that it prohibited the interstate transportation of fish taken in violation of state or foreign law. *See* 127 Cong. Rec. 17,329 (remarks of Senator Howard Baker).

[20] The defendants point to the fact that the pre-1981 Lacey Act prohibited trade in wildlife taken in violation of "any law or regulation of any State or foreign country," but that now the Lacey Act does not refer to foreign laws and regulations. "While the leg-

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594,464 Pounds of Salmon, 871 F.2d at 828. Indeed, Congress clearly stated that the amendments were meant to strengthen the existing wildlife protection laws and to "provide [the government] the tools needed to effectively control the massive illegal trade in fish, wildlife and plants." 127 Cong. Rec. 17,327 (remarks of Senator Chafee); *see also* 127 Cong. Rec. 26,537 (1981) (remarks of Representative John Breaux). The Senate Report provided that the amendments "would allow the Federal Government to provide more adequate support for the full range of State, foreign and Federal laws that protect wildlife." S. Rep. No. 97-123, at 4. The amendments were intended to "raise both the civil and criminal penalties of the current laws and target commercial violators and international traffickers." 127 Cong. Rec. 17,328 (remarks of Senator Chafee). By strengthening the penalty provisions of the Lacey Act, Congress intended "to give the Federal Government stronger enforcement tools to stop the large-scale importation and taking of fish . . . which enjoy protection under other foreign . . . laws." *Id.* at 17,329 (remarks of Senator James Strom Thurmond).

Our examination of the legislative history of the Lacey Act leads us to the conclusion that Congress by no means intended to limit the application of the Act by its adoption of the 1981 amendments. The defendants' interpretation is untenable, because it would restrict the application of the Lacey Act unduly and would thwart Congress's stated goal of strengthening the Act by amending it in 1981. *See id.* at 17,328 (remarks of Senator Chafee). Their narrow interpretation of the phrase "any foreign law" would prevent the

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islative history is not totally one-sided, the thrust of Congress's intention in amending the Act was to expand its scope and enhance its deterrence effect." *594,464 Pounds of Salmon*, 871 F.2d at 828.

wildlife conservation laws of many countries from serving as the basis for Lacey Act violations and would limit the Act's utility. We therefore conclude that regulations and other such legally binding provisions that foreign governments may promulgate to protect wildlife are encompassed by the phrase "any foreign law" in the Lacey Act.[21] *See United States v. Lee*, 937 F.2d 1388, 1391-92 (9th Cir. 1991) (holding that a Taiwanese fishing regulation constituted "foreign law"); *594,464 Pounds of Salmon*, 871 F.2d at 828 (holding the same).

As we have determined that the phrase "any foreign law" includes nonstatutory provisions such as Resolution 030-95 and Regulation 0008-93, we now turn to the defendants' argument that their convictions were based upon the district court's erroneous interpretation of foreign law.

II. Honduran Laws

The defendants contend that the Honduran laws that served as predicates for their convictions were invalid. Specifically, they argue that (1) Resolution 030-95, which established a 5.5-inch size limit for lobsters, never had the effect of law, because it was promulgated improperly and has been

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[21] The defendants also argue that because the Lacey Act is ambiguous as to the meaning of "any foreign law," the rule of lenity requires that any doubt be resolved in their favor. Lenity, however, is "reserved . . . for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotation marks omitted); *see also United States v. Curry*, 902 F.2d 912, 915 (11th Cir. 1990). As our examination of the legislative history clarifies the purpose of and motivation behind the Lacey Act, the defendants' invocation of the rule of lenity fails.

declared void by the Honduran courts; (2) Regulation 0008-93, which established inspection and processing requirements for the lobster fishing industry, was repealed in 1995, prior to the time period covered by the indictment; and (3) Article 70(3), which prohibits the harvesting and destruction of lobster eggs, was misinterpreted by the district court and was repealed retroactively in 2001.

As the defendants were found guilty of conspiracy under a general verdict, there is no way to know which Honduran law the jury relied upon in determining their guilt. Thus, if any of the three Honduran laws that the defendants challenge were invalid during the time period covered by the indictment, the defendants' convictions must be reversed.[22] *See Mills v. Maryland*, 486 U.S. 367, 376 (1988) (In criminal cases, "the [Supreme] Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict.").

We review a district court's interpretation of foreign law de novo. *United States v. Gecas*, 120 F.3d 1419, 1424 (11th

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[22] The government acknowledges that the rule stated above generally is true, but argues that the defendants are estopped from benefitting from that general rule because they "objected to a special verdict form and requested general verdicts." We disagree. The record indicates that the only objection to the special verdict forms was made by Blandford's attorney, who initially stated that he did not "like" the special interrogatories. Upon hearing the government's explanations for the special verdict forms, none of the defendants made any further objections. Thus, the district court declined to use the government's special verdict forms sua sponte, apparently because it considered them too complicated for the jury members to use in their deliberations.

Cir. 1997) (en banc). Our determination of foreign law is complicated by the posttrial shift in the Honduran government's position regarding the validity of the laws at issue in this case.[23] The Honduran government now maintains that the laws were invalid at the time of the lobster shipments or have been repealed retroactively. Thus, we must decide whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to follow the Honduran government's original position.

As we begin our analysis, we must make clear that the crux of this case is the validity of the Honduran laws during the time period covered by the indictment. Much of the defendants' arguments focus upon the fact that none of the laws are currently valid; however, their reliance upon the current invalidity of the laws is misplaced. "Although Lacey Act offenses are predicated upon violations of [foreign] law, the statute nowhere states that a viable or prosecutable [foreign] law violation is necessary to support federal charges. Instead, the Act simply requires that the fish or wildlife have been obtained in violation of any [foreign] law . . . ." *United States v. Borden*, 10 F.3d 1058, 1062 (4th Cir. 1993) (internal quotation marks omitted).[24] The reference to foreign law in

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[23] Despite the fact that Honduran officials supported the government throughout the investigation and trial of this case, the Embassy of Honduras filed an amicus curiae brief in support of McNab.

[24] In *Borden*, two state statutes served as the predicates for the Lacey Act violations. 10 F.3d at 1062. The defendant "contend[ed] that his indictment [wa]s invalid because the one-year statute of limitations for the predicate state offenses had expired by the time the indictment was returned." *Id.* He argued that the state statute of limitations governed Lacey Act violations, "because the

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the Lacey Act is there to define what constitutes illegal conduct. Thus, the subsequent invalidation of the underlying foreign laws does not make the defendants any less culpable for their actions. If the laws were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act by importing the lobsters in violation of those laws. Whatever changes in the laws occurred after the lobsters were imported into the United States illegally have no effect on the defendants' convictions.

In a Lacey Act prosecution, once the district court determines the validity of a foreign law during a given time period, it is up to the government to prove that the defendants knowingly violated those laws. *United States v. Todd*, 735 F.2d 146, 151 (5th Cir. 1984). The initial foreign law determination, however, is a question of law for the court. *See* Fed. R. Crim. P. 26.1. "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *Id.* Among the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country. The district court, in the course of a Lacey Act prosecution, is entitled to rely upon such representations by foreign officials as to the validity of their government's laws. The court reasonably may assume that

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existence of a *prosecutable* violation of state law [wa]s necessary to support a Lacey Act indictment." *Id.* The Fourth Circuit concluded that even though the Lacey Act "incorporates the substantive elements of state law," "it is not designed to incorporate state *procedural* law." *Id.* (internal quotation marks omitted). Thus, although the state statute of limitations had run on the state offense, the defendant's indictment still was valid.

statements from foreign officials are a reliable and accurate source and may use such statements as a basis for its determination of the validity of foreign laws during a given time period.[25]

When, however, a foreign government changes its original position regarding the validity of its laws after a defendant has been convicted, our courts are not required to revise

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[25] Although the amici suggest that the government used improper procedures, such as seeking out midlevel employees who were not authorized to render opinions on behalf of the Honduran government in its effort to ascertain the applicable Honduran laws, the record indicates quite the contrary. On February 9, 1999, an NMFS agent sent a formal request to the deputy director of the DIGEPESCA seeking information regarding the legality of the lobster referenced in the anonymous facsimile. The director general of the DIGEPESCA sent two letters to the NMFS in response to the inquiry. In his first letter, dated February 12, 1999, the director general described some of the Honduran laws governing the lobster industry, including Resolution 030-95. In a second letter, dated February 25, 1999, the director general confirmed that the lobsters "ha[d] been illegally transported in violation of the Fishing Law, the Industrial and Hygienic Sanitary Inspection Regulation for Fish Products and Resolution No. 030-95" and included copies of the laws. The director general further stated the he supported all efforts "to legally prosecute natives or legalized Americans that violate the articles of the Lacey Act." The letter was copied to the minister and vice minister of the SAG. In addition, SAG Minister Guillermo Alvarado Downing confirmed in an affidavit that Secretary General Paz could "provide the necessary advice about and explanation of the enforcement and validity of Honduran laws, and especially the fisheries laws enforced by this Ministry." Thus, it is clear that the government conducted its investigation properly through the Honduran officials who were responsible for interpreting, enforcing, and applying the fishing laws of Honduras.

their prior determinations of foreign law solely upon the basis of the foreign government's new position. There must be some finality with representations of foreign law by foreign governments. Given the inevitable political changes that take place in foreign governments, if courts were required to maintain compliance with a foreign government's position, we would be caught up in the endless task of redetermining foreign law.

In this case, the government solicited and received the assistance of the SAG and the DIGEPESCA during the investigation of the legality of the lobster shipments. From the earliest stages of the investigation until after the defendants were convicted, the statements from the SAG were consistent with the government's understanding of the laws. After the defendants were convicted, however, certain events in Honduras induced the Honduran government to refute its original statements. The newly issued statements and opinions of Honduran officials, however, do not persuade us that the district court erred in its determination that the Honduran laws at issue were valid and enforced during the time period covered by the indictment.

By our decision today, we do not mean to impinge upon any foreign government's sovereignty. Honduras has every right to invalidate and repeal the laws at issue in this case. The district courts and the government of the United States, however, have the right to rely upon the Honduran government's original verifications of its laws. We must have consistency and reliability from foreign governments with respect to the validity of their laws. Otherwise, there never could be any assurance when undertaking a Lacey Act prosecution for violations of foreign law that a conviction will not be invalidated at some later date if the foreign government changes its laws. Acceptance of the Honduran government's current interpretation of its laws as determinative of the validity of the laws would set the foundation for future Lacey

Act defendants to seek post-conviction invalidation of the underlying foreign laws. Although such is not the case here, it is not difficult to imagine a Lacey Act defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials to invalidate a particular law serving as the basis for his conviction in the United States. Such a scenario would completely undermine the purpose of the Lacey Act. There would cease to be any reason to enforce the Lacey Act, at least with respect to foreign law violations, if every change of position by a foreign government as to the validity of its laws could invalidate a conviction.

Thus, we conclude that the postconviction shift in the Honduran government's position regarding the validity of its laws is not determinative as to whether the laws were valid at the time the lobsters were imported into the United States. We now examine each law in turn to determine whether each was valid during the time period covered by the indictment.

Resolution 030-95

Resolution 030-95, the law establishing the 5.5-inch size limit for lobsters, provides for sanctions for noncompliance with its terms. *See* Resolucion No. 030-95, Dec. 5, 1995, La Gaceta, Jan. 4, 1996. The defendants argue that Resolution 030-95 never was a binding law,[26] because it was not issued in accordance with Honduran constitutional procedure.

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[26] This argument is inconsistent with McNab's prior acknowledgment of the validity of the 5.5-inch size limit and his instructions to his lobster boat captains to abide by it. In a letter to his fishing boat captains, dated October 28, 1999, McNab advised that "[i]t is absolutely prohibited to capture lobsters under the size allowed by the Law and/or eggbearing lobsters. . . . You will only keep those lobsters measuring more than 5.5-inches." A second

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The basis for the defendants' argument that Resolution 030-95 never was a valid law is an opinion from the Honduran Court of the First Instance of Administrative Law.[27] In May of 2001 the Honduran administrative law court found that Resolution 030-95 had been promulgated through an incorrect procedure and ordered that the resolution was "entirely voided, *but this is only for purposes of [its] annulment and future inapplicability*: This Resolution does not confer any right to claims." R. at 5:324 Ex. B (emphasis added). Subsequently, the Honduran Court of Appeals for Administrative Law affirmed the lower court's decision invalidating Resolution 030-95. R. at 1 Supp.:415 Ex. C.

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letter was sent to the fishing boat captains by the general manager of McNab's company on July 31, 2000. The captains were "reminded to comply with the sizes and weights that the lobster caught must fulfill, which is 5 ½ inches."

Furthermore, throughout the investigation and after the trial, Honduran officials repeatedly confirmed that Resolution 030-95 was a valid and binding law. The director general of the DIGEPESCA confirmed the size limit requirement in three separate letters. Resolution 030-95 was cited by several Honduran officials as a valid and binding law during two trips to Honduras by NMFS agents, one before and one after the defendants' trial. Secretary General Paz testified as to the validity of Resolution 030-95 during the pretrial foreign law hearing. Thus, it is evident that Resolution 030-95 was considered binding by those responsible for its enforcement.

[27] After the trial in the district court had begun, McNab filed a petition in the Honduran Court of the First Instance of Administrative Law, seeking to annul Resolution 030-95 on the grounds that the resolution had not been signed by the Honduran president before being issued and that it should have been issued as a decree rather than as a resolution.

There are conflicting opinions from Honduran officials as to the effect of the court's annulment of Resolution 030-95 on the defendants' convictions.[28] While we certainly respect

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[28] The affidavit of the assistant attorney general of Honduras indicates that the decision annulling Resolution 030-95 does not apply retroactively and does not legalize the shipments of undersized lobsters retroactively. The attorney general of Honduras, however, offers an alternative explanation for the prospective language in the court's decision that favors the defendants. He contends that Resolution 030-95 was annulled ab initio, that it never was a valid law and, therefore, cannot serve as a basis for the defendants' convictions. Although the dissent accepts his explanation that Resolution 030-95 never was binding and that the prospective language merely protects the Honduran government from civil liability, we believe that the attorney general is extracting meaning from the Honduran court's decision that is not supported by the language of the opinion. In addition, although a report from the Honduran national human rights commissioner advised that Secretary General Paz's testimony be disqualified as legal error and that Resolution 030-95 be declared void retroactively, a subsequent meeting between the commissioner and an NMFS agent revealed that the commissioner was unaware of the factual background of the prosecution at the time he rendered his report. Furthermore, the commissioner said that he felt "pressured" by McNab's representatives to issue a quick decision.

McNab points to the statement of SAG Minister Downing to support his assertion that aside from Article 96 of the Honduran Constitution, the Honduran appellate court's decision mandates retroactivity. Downing bases his opinion that the invalidation applies retroactively upon an inexplicable assertion that the Honduran appellate court's opinion "expands" the Honduran Court of the First Instance of Administrative Law's opinion and somehow mandates retroactivity. We, however, find nothing in the Hondu-

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the opinions of the Honduran officials, we base our determination that Resolution 030-95 was valid during the time period covered by the indictment upon the Honduran court's opinion. The Honduran court clearly stated that Resolution 030-95 was annulled for prospective application only, and we assume that the Honduran court meant what it said. Although we recognize that Resolution 030-95 is now invalid, we see nothing in the Honduran court's opinion to indicate that the nullification should be applied retroactively.[29] In fact, the decision mandates prospective application.[30] Thus,

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ran appellate court's decision requiring retroactivity, because the Honduran appellate court issued a summary affirmance.

[29] We note that with the permission and approval of the minister of the SAG, both Secretary General Paz and SAG Legal Advisor Jose Bernardo Torres Umanzor confirmed that the Honduran government continued to enforce Resolution 030-95 as a valid and binding law while the appeal was pending before the Honduran Court of Appeals for Administrative Law. They also explained that any annulment of Resolution 030-95 would not be retroactive, because the Honduran court's judgment pertained to an administrative matter, not a criminal matter.

[30] We briefly address the defendants' argument that the Honduran Constitution requires that the invalidation of Resolution 030-95 be applied retroactively in this case. Article 96 of the Honduran Constitution provides, "The Law does not have retroactive effect, except in penal matters when the new law favors the delinquent or the person that is prosecuted." Constitución de la Republicá de Honduras art. 96. Article 96, however, has no application in this case. The reason that we look to foreign law in Lacey Act prosecutions is to determine what constitutes illegal conduct. At the time of the defendants' conduct, harvesting lobsters under 5.5 inches was a violation of Resolution 030-95. The fact that Honduras now may not hold the defendants liable for past shipments that

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Resolution 030-95 is a valid predicate for the defendants' convictions.[31]

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contained undersized lobsters does not change the fact that those shipments violated then-valid Honduran laws and the Lacey Act.

The government's evidence, both pretrial and posttrial, indicates that because the Honduran court's judgment about Resolution 030-95 involved an administrative matter and not a is a criminal matter it has no retroactive effect. Although McNab's evidence, submitted postconviction, may indicate a contrary view, it is clear that a consensus has not been reached on this issue in Honduras. Nevertheless, we still must determine the best reading of the laws. *See United States v. Mitchell*, 985 F.2d 1275, 1281 (4th Cir. 1993) ("Perhaps, as is the case with many of our own laws, a consensus has not yet been reached in Pakistan. Yet we are charged with determining the best reading of the laws.").

In our judgment, the government's evidence and a plain language reading of Article 96 require us to find that Article 96 does not apply in this case and that the invalidation of Resolution 030-95 applies prospectively. Article 96 expressly provides that "[t]he Law does not have retroactive effect." This is consistent with the Honduran court's judgment that the invalidation of Resolution 030-95 be applied prospectively. The only exception under Article 96 is a "new law" in criminal matters.

McNab's view requires a finding that "[t]he Law" in Article 96 applies to judicial declarations of the invalidity of an existing law as opposed to the enactment or promulgation of a "new law." The language of Article 96 does not support this view. In the second clause of the sentence, Article 96 specifically refers to a "new law" that favors the accused. It does not refer to the absence of a law or a declaration that a law is invalid.

[31] The dissent concedes that reversal of the defendants' convictions is not required if the invalidation applies prospectively.

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Regulation 0008-93

Regulation 0008-93 was issued pursuant to Decree 40 and required that lobsters be inspected and processed in Honduras prior to exportation. *See* Acuerdo No. 0008-93, Jan. 13, 1993, La Gaceta, Apr. 7, 1993. In January of 1995 the Congreso Nacional enacted Decree 157-94, which repealed and replaced several existing statutes, including Decree 40. *See* Decreto No. 157-94, Nov. 15, 1994, La Gaceta, Jan. 13, 1995. In December of 1999 the Secretaria de Recursos Naturales y Ambiente issued Accord 1081-99, an administrative regulation that contained updated inspection and processing requirements and expressly repealed Regulation 0008-93. *See* Acuerdo No. 1081-99, Sept. 23, 1999, La Gaceta, Dec. 2, 1999.

On the basis of their posttrial research, the defendants argue that Regulation 0008-93 was repealed along with Decree 40 in 1995.[32] They contend that the repeal of Decree 40 op-

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Further, the dissent concedes that "the language of the Honduran Court could be construed to mean prospective application only." We conclude that the language of the Honduran court opinions requires prospective application only and that nothing else in the record mandates otherwise.

[32] The defendants also raise a second challenge with respect to the propriety of Regulation 0008-93 as a Lacey Act predicate. They argue that even if Regulation 0008-93 were not repealed until 1999 it falls outside the scope of the Lacey Act, because it is not a law regulating the taking, possessing, transportation, or sale of wildlife. We disagree. When Congress amended the Lacey Act in 1981, it expressly stated that the Act covers laws "relating or referring to fish or wildlife or plants." S. Rep. No. 97-123, at 5; *see also United States v. Lewis*, 240 F.3d 866, 869 (10th Cir. 2001) (per curiam); *Lee*, 937 F.2d at 1392. Accordingly, our review of

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erated to repeal the regulations promulgated under it, including Regulation 0008-93. The defendants argue that the automatic repeal of regulations triggered by the repeal of the statute under which those regulations were promulgated is a longstanding principle of Honduran law, and they rely upon a recent interpretive decree by the Congreso Nacional for support. *See* Decreto No. 198-2001, Nov. 1, 2001. That decree expressly provides that "the express total or partial repeal of a law leaves without legal value or effect the general regulations and the specific regulations totally . . . that the Executive Branch through the respective Secretariat of State has issued to implement the provisions of the repealed Law . . . ." *Id.*

We are unconvinced by the defendants' argument for two reasons. First, we question why there is a need to issue an interpretive decree if the concept of an automatic repeal of regulations is such a longstanding principle of Honduran law.[33] Second, Regulation 0008-93 was repealed *expressly*

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the regulation confirms that it unquestionably relates to fish and is within the scope of the Lacey Act.

[33] The evidence in the record contradicts this assertion and establishes that the Honduran government regarded the hygiene regulation as valid between the time of the 1995 repeal of Decree 40 and the 1999 express repeal of Regulation 0008-93. The March of 2000 statements by the Honduran legal advisors described the processing requirements mandated by Regulation 0008-93 *and* Decree 157-94, the very same decree that the defendants contend repealed Regulation 0008-93 in 1995. At the pretrial foreign law hearing, the SAG's Secretary General Paz testified as to the validity of the processing and inspection requirements. Secretary General Paz stated that Regulation 0008-93 continued to be enforced in Honduras, because it was only tacitly repealed in 1995.

by the Secretaria de Recursos Naturales y Ambiente in 1999 when it issued new rules for lobster fishing. There would be no need to repeal Regulation 0008-93 expressly in 1999 if it was repealed automatically in 1995.

Furthermore, the Honduran Civil Code provides support for the proposition that Regulation 0008-93 remained in effect until the express repeal in 1999.[34] According to the Civil Code, a law may be repealed totally or partially by another law. Código Civil art. 42. Such a repeal may be express or tacit; it is express when the new law expressly provides that it repeals the previous one, and it is tacit when the new law's provisions cannot be reconciled with the previous law. Código Civil art. 43. Significantly, a "tacit repeal leaves in effect in the previous law anything not in conflict with the provisions of the new law, even though both versions may cover the same matters." Código Civil art. 44. The 1995 decree did not repeal Regulation 0008-93 expressly, which means that any repeal of the regulation was tacit. As Regulation 0008-93 did not conflict with the 1995 decree, it remained in effect until the 1999 regulation expressly repealed it. Thus, the district court properly determined that Regulation 0008-93 was valid during the time period covered by the indictment.

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[34] Not only does the Honduran Civil Code support the district court's determination that Regulation 0008-93 was valid during the time period covered by the indictment, the defendants' interpretation leads to an illogical result. An automatic repeal of Regulation 0008-93 in 1995 would have created a four-year window during which there were no sanitary regulations for lobster fishing. This would have been an odd result considering that the 1995 decree issued by the Congreso Nacional was intended to strengthen the hygiene requirements.

Article 70(3)

Article 70(3) of the Fishing Law prohibits the harvesting or destruction of lobster eggs. *See* Decreto No. 154, May 19, 1959, La Gaceta, June 17, 1959. The defendants argue that Article 70(3) does not prohibit the destruction or collection of lobster eggs for profit. They contend that the district court's interpretation that the law prohibited the harvesting of the egg-bearing species themselves was erroneous.[35]

We fail to see how Article 70(3) can be read other than to prohibit the destruction or harvesting of the eggs of lobsters for profit. The destruction of eggs to sell the female lobsters appears to be a clear violation of Article 70(3), which provides for punishment by fine or imprisonment to "[t]hose who destroy or harvest the eggs, or the offspring of fish, chelonians or other aquatic species for profit." *Id.* The defendants' argument regarding the legality of capturing egg-bearing lobsters is contrary to the plain language of Article 70(3).[36]

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[35] Lobsters have swimming legs on their abdomens called swimmerets, which female lobsters use to hold eggs. 7 *The New Encyclopedia Britannica* 430 (15th ed. 1998). The swimmerets of some of the lobsters in the seized shipment were clipped off and the eggs were removed.

[36] Not only is their interpretation contrary to the plain language of Article 70(3), it directly conflicts with McNab's own instructions to his boat captains that harvesting egg-bearing lobsters was prohibited. The October 1999 letter from McNab to his fishing boat captains provided that "[i]t is absolutely prohibited to cut the pleopods of the Lobsters to remove any eggs . . . . All the lobsters with eggs will be returned to the sea without any exception. For that purpose, you will have to instruct the fisherman who work in the boats on how to identify them." The letter from McNab's general manager to the captains in July of 2000 instructed that they

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The defendants also argue that Article 70(3) was repealed retroactively in February of 2001 by the enactment of Decree 245-2000 by the Congreso Nacional. As stated above, our duty with respect to each of the Honduran laws is to determine whether they were valid during the time period covered by the indictment. Whether the 2001 amendment to Article 70(3) repealed the prohibition against harvesting egg-bearing lobsters for profit is not our concern. Thus, we reject the defendants' argument that Article 96 of the Honduran Constitution requires that we apply the 2001 amendment retroactively for the reasons stated with respect to Resolution 030-95. Accordingly, we conclude that Article 70(3) was a proper predicate for the defendants' convictions.

Thus, the defendants' newfound support from the Honduran government does not change the fact that during the time period covered by the indictment, the laws at issue were valid. Although we certainly respect the Honduran government's position, the recent developments since the trial and the newly rendered opinions from Honduran officials cannot turn what were illegal lobster shipments into legal lobster shipments retroactively.

Having determined that Resolution 030-95, Regulation 0008-93, and Article 70(3) were valid during the time period covered by the indictment and thus were proper predicates for the Lacey Act charges, we now briefly address the defendants' remaining issues on appeal. The defendants argue that (1) the district court abused its discretion by excluding evidence at trial relating to McNab's "knowledge" of Honduran

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may "not capture lobsters that are in their reproductive phase or gravid lobsters (with eggs). It is absolutely prohibited to remove egg sacs from the lobster to remove its eggs . . . ."

law; (2) the district court made several errors with respect to the jury instructions; (3) there was insufficient evidence to support the jury's verdicts; and (4) the district court erred in failing to postpone Schoenwetter and Blandford's sentencing and in determining the length of their sentences. After thoroughly reviewing the record, we find that these issues are without merit.

CONCLUSION

Thus, we conclude that the Honduran laws used as the underlying predicates for the defendants' convictions fall within the scope of the Lacey Act and were valid and legally binding during the time period covered by the indictment. The remaining issues raised by the defendants were decided properly by the district court or are without merit. We therefore AFFIRM the defendants' convictions and sentences.

FAY, Circuit Judge, dissenting:

The majority opinion is both thorough and scholarly in dealing with this complicated matter. With some hesitation, I most respectfully dissent from that portion of the majority opinion upholding the validity of Honduran Resolution 030-95. The theme of the majority opinion is that the government of Honduras has "shifted" its position. The question for determination is phrased as being complicated by the changed or new position of the Honduran government. The majority then decides this issue within the framework of whether or not we are free to follow the Honduran government's original position.

Try as I might, I simply cannot read this record that way. There was never unanimity nor agreement concerning the validity of Resolution 030-95. That question was hotly contested. But, throughout the course of this litigation, the resolution of that question was based upon the weight given by the trial judge to the evidence presented by the U.S. government during a pretrial hearing on foreign law. At that time, the Honduran courts had not ruled. Now they have.

It should come as no surprise to anyone that some of the "expert" witnesses were correct and some were wrong. Nor should we be surprised that it was the courts of Honduras which ultimately answered the question. That is the way it works in Honduras and in the United States of America. Simply stated, it is my position that we are bound by the rulings of the Honduran courts declaring Resolution 030-95 null and void. This being the case, the defendants convictions must be reversed since one of the Honduran laws relied upon by the jury in finding guilt has now been found to be a nullity.

Most respectfully, I disagree with the majority's conclusion that the government of Honduras has changed its position. Government officials testified on both sides of the issue

before the district court. There was no one official voice for the government of Honduras. But, there is now. The Honduran courts have ruled and the Honduran Embassy has filed an *amicus* brief advising us of the Honduran government's position—Resolution 030-95 is null and void and was so during the critical time charged in the second superceding indictment. That is the only official government position I am aware of in this record.

We all agree that the key component to any alleged Lacey Act § 3372(a)(2)(A) violation is the commission of a predicate State or Foreign offense concerning fish or wildlife. We further agree that, for purposes of these appeals, three predicate offenses are pertinent. Of those three, my concern goes to Resolution 030-95 concerning the minimum legal size of harvested lobster tails. As the majority correctly notes, the district court properly conducted a foreign law hearing to determine whether Resolution 030-95 was, in fact, a valid Honduran law during the time period charged in the second superseding indictment. Over the testimony of an expert in Honduran law, a Honduran law professor and former Ministry of Justice, the then Attorney-General of the Republic of Honduras, the Honduras Bar Association and others, the District Court, based upon the testimony of one lower-level Honduran government official, Liliana Paz, Secretary General of the Ministry of Agriculture and Livestock, concluded that Resolution 030-95 was a valid law.

Following trial and conviction, defendant David Hensen McNab ("McNab") challenged the validity of Resolution 030-95 in the Court of First Instance of Administrative Law in Honduras ("Honduran Court"). That challenge was opposed by an attorney representing the government of Honduras. At the conclusion of that proceeding, the Honduran Court declared Resolution 030-95 to be null and void. Specifically, on May 23, 2001, the Honduran Court found:

> First: . . . [Resolution 030-95] [does] not conform to law by virtue of having violated the legal code at the time [it] [was] issued. Second: the challenged [Resolution] . . . , No. 030-95 of December 5, 1995, [is] entirely voided, but this is only for purposes of [its] annulment and future inapplicability: This Resolution does not confer any right to claims.

R. at 5:324 Ex. B. The Honduran Court premised its decision on the fact that Resolution 030-95 was not properly issued by the President of the Republic of Honduras and authorized by the proper Secretary or Under Secretary of State as is required under Honduran law. Subsequently, the government of Honduras appealed the Honduran Court's ruling to the Court of Appeals of Administrative Matters ("Honduran Court of Appeals") which on October 11, 2001, confirmed the correctness of the Honduran Court's decision.

The rulings of the Honduran courts do raise a second question as to whether or not the ruling applies retroactively. As quoted above, the language of the Honduran Court could be construed to mean prospective application only. That is the position the majority takes in this case. Therefore, the critical question before this court is whether or not Resolution 030-95 was valid at the time of the defendants' conduct as charged in the second superceding indictment. This question is determined by whether the invalidation of Resolution 030-95 is to be applied retroactively or prospectively. If the invalidation of Resolution 030-95 is to be applied retroactively, it seems to me that reversal of the defendants' convictions is mandated. If invalidation is to be only applied prospectively, reversal is not required.

We all agree that we review a district court's interpretation of foreign law *de novo*. *United States v. Gecas*, 120 F.3d 1419, 1424 (11th Cir. 1997) (en banc). We also agree

that under certain circumstances an underlying Lacey Act predicate offense need not be independently prosecutable. *See United States v. Borden*, 10 F.3d 1058 (4th Cir. 1993) (affirming Lacey Act conviction where the enforcement of underlying predicate state law was barred by applicable state statute of limitations but not by federal statute of limitations). However, *Borden*, or any similar case, is fundamentally different than this case where the predicate substantive criminal law supporting the Lacey Act convictions cannot be enforced, not because of a procedural bar, but because the law itself has been invalidated by the courts through nullification. In other words, what was thought to be a crime turns out to not be a crime under Honduran law. It bears noting that had U.S. law been implicated, reversal of the convictions would not be in question and the case would easily be resolved in the defendants' favor. In the United States, where a substantive criminal law is subsequently declared to be invalid by the courts, any convictions thereon would be reversed.

Further troubling is the fact that as a matter of Honduran constitutional law, these defendants could not be tried and convicted for violation of Resolution 030-95 in Honduras. In Honduras, as in the United States, any criminally enforceable statute later declared to be invalid by the courts is retroactively applied to any criminal defendant. Article 96 of the Honduran Constitution specifically provides, "[t]he Law does not have retroactive effect, except in penal matters when the new law favors the delinquent [(i.e., criminally convicted)] or the person that is prosecuted." Constitución de la Republicá de Honduras art. 96.

The majority makes note of Article 96 but simply asserts its inapplicability by concluding that "[a]t the of time the defendants' conduct, harvesting lobsters under 5.5 inches was a violation of Resolution 030-95." As stated above, if the invalidation of Resolution 030-95 is retroactively applied, as I believe it must be, then at the time of the defendants' con-

duct, there would not have been a violation of Resolution 030-95. To this point, there are authorities in the record which I find particularly relevant in deciding whether the Honduran Court's invalidation of Resolution 030-95 should be retroactively applied.

We start with the official voice of Honduras in the United States. The country of Honduras, through its Embassy in Washington, D.C., has filed an *amicus* brief stating unequivocally that retroactive application is the law of Honduras. The current Attorney General of the Republic of Honduras, Sergio Zavala Leiva, the National Human Rights Commissioner of the Republic of Honduras, Leo Valladares Lanza,[1] the current Secretary of State of the Offices of Agriculture and Livestock, Guillermo Alvarado Downing and Secretary Downing's subordinate and star U.S. government witness before the district court, Secretary General of the Ministry of Agriculture and Livestock, Liliana Paz, all support the position that retroactive application is required. The only witness presented suggesting that retroactive application is not required is Juan Arnaldo Hernandez Espinoza, an Assistant Prosecutor General of the Public Ministry of the Republic of Honduras.[2] Thus, the overwhelming evidence be-

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[1] Although his opinion was never altered, amended or changed in any manner, the majority notes that a National Marine and Fisheries Service agent who interviewed Commissioner Lanza indicated that Commissioner Lanza revealed that he felt "'pressured' by McNab's representatives to issue a quick decision."

[2] In his opinion, Assistant Attorney General Espinoza ("Espinoza") indicates that there is no retroactive application of the invalidation of Resolution 030-95 because "the sanction to which [the defendants'] conduct applies is based on a measure that originates in the Fishing Law and not in the activity of the Executive Branch." Appellee's Addendum of Foreign Law Materials at tab

[Footnote continued on next page]

fore this court is squarely on the side of the retroactive application of the invalidation of Resolution 030-95. I can come to no other conclusion.

As to the appropriate interpretation of the Honduran Court's use of the terms "annulment" and "future inapplicability," Attorney General Leiva provides the most reasoned and reasonable explanation. Attorney General Leiva explains:

> The reason that the laws of Honduras and, in particular, the Court of Administrative Appeals, with its specific language in its judgment, only set forth its future inapplicability is to guarantee the legal security of the State, protecting it from damages and losses that could have been caused by the enforcement of an act that is null and void as a matter of law.

(Leiva Decl. ¶ 8).

[Footnote continued from previous page]

1. Upon closer examination, it becomes clear that Espinoza's opinion is premised on the assumption that the Fishing Law, not Resolution 030-95, defines the minimum lobster harvest size. Therefore, invalidation of Resolution 030-95, a resolution implemented pursuant to the authority of the Fishing Law, is without import and the question of retroactivity is rendered irrelevant. This opinion is mistaken for two critical reasons. Firstly, Espinoza's opinion ignores the fact that, for purposes of U.S. law, the predicate act the defendants were charged with violating is Resolution 030-95, not the Fishing Law. Secondly, Espinoza's opinion ignores the fact that, with regard to minimum lobster harvest size, the Fishing Law is silent and directs such restrictions to be fashioned pursuant to regulation. *See* Decreto No. 154, May 19, 1959, La Gaceta, June 9, 1959, art. 70.

Apparently, in Honduras the government may be subject to civil liability for the enforcement of a subsequently declared invalid law. Therefore, in the context of Honduran law, the Honduran Court's language makes sense and simply seeks to limit the government's liability and protect its treasury. The precise language of the Honduran Court supports this interpretation. Following the use of "annulment" and "future inapplicability" is a colon followed by the following illuminating language, "[t]his Resolution does not confer any right to claims." Thus, Attorney General Leiva's explanation, as compared to the other evidence before the court, is most compelling. Furthermore, this court should not interpret Honduran law in a vacuum. As stated above, in Honduras, Article 96 of the Honduran Constitution retroactively applies the invalidation of Resolution 030-95 to any criminal defendant. The Honduran Court certainly would have been aware of the existence and effect of Article 96 when crafting the language and scope of its opinion and this court should seek to interpret the Honduran Court's opinion in its proper context.

The majority advances the important principle of finality in support of its decision. As a general proposition, I agree that finality is an important aspect of American jurisprudence. However, in the context of an invalidated substantive criminal law which forms the basis of a criminal prosecution or conviction, reliance on the concept of finality is misplaced. As stated above, under both U.S. and Honduran law, retroactive application is warranted for a criminal defendant charged or convicted of a subsequently declared invalid criminal statute. *Cf.*, *Davis v. United States*, 417 U.S. 333, 346, 94 S. Ct. 2298, 2305, 41 L. Ed. 2d 109, 119 (1974) (in the context of a petition for relief pursuant to 28 U.S.C. § 2255, concluding that if conviction and punishment are for an act not made criminal by the law, "[t]here can be no room for doubt that such a circumstance inherently results in a

complete miscarriage of justice . . . ." (Internal quotations omitted)).

For emphasis, I repeat again that the majority opinion discusses extensively and is strongly critical of the changed position or shift by the Honduran government. While that terminology may give comfort to the majority, it is simply not accurate. While various government officials gave conflicting opinions regarding the validity of Resolution 030-95, this was before the Honduran courts ruled. The Honduran courts have now ruled and both agree, Resolution 030-95 was null and void. The majority casts this in an unfavorable light akin to something sinister. In my opinion, this is no different than what occurs routinely in our country. Attorneys, and even the Attorney General of a state or the United States, often express opinions about statutes only to find that after a court challenge, they were wrong. That is all that happened here. Some of the experts were right; some were wrong. But, the Honduran courts have now spoken and there is simply no doubt that Resolution 030-95 is null and void as if it never existed.

To suggest that the newly issued statements and opinions of Honduran officials do not carry the weight of the earlier statements is a strange position for members of the judiciary. The so-called "shift in position" is the result of lawful litigation within the courts of a foreign nation. I think we would be shocked should the tables be reversed and a foreign nation simply ignored one of our court rulings because it caused some frustration or inconvenience.

The evidence in this case supports the conclusion that the defendants were guilty of knowingly violating the law at the time they harvested, shipped and sold these "shorts." The prosecutors did their very best to establish the law of Honduras which is essential under the Lacey Act. It is easy to understand the frustration inherent in this present situation. But, the Lacey Act, by its very terms, is dependent upon the

laws of a foreign sovereign. In this situation, we do not control the outcome of challenges made to those underlying laws. No one has suggested that McNab was not exercising his lawful rights as a citizen of Honduras or that the courts of Honduras were without authority to issue the decisions they did.

Most reluctantly, I therefore dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO. 1:00-00079-(1, 2, 3 & 4)-RV

[Filed October 12, 2000]

DAVID HENSON MCNAB, ROBERT D. BLANDFORD, ABNER SCHOEN-WETTER, DIANA H. HUANG

ORDER

This matter is before the court on the following documents:

1. "Motion for Pretrial Determination of Foreign and State Law Pursuant to Fed. R. Crim. P. 12(b) and 26.1 and Memorandum in Support Thereof," (doc. 46), together with evidentiary materials, (in redwell), filed by the government;

2. "Motion to Dismiss Counts One through Twelve and Counts Twenty-Eight Through Forty-Three of the In-

dictment," (doc. 53), filed by defendant David Henson McNab:[1]

3. "Opposition To Defendant McNab's Motion to Dismiss Counts One Through Twelve and Counts Twenty-Eight Through Forty-Three of the Indictment," (doc. 87), filed by the government;

4. "Supplement/Amendment to . . . Motion for Pretrial Determination of Foreign and State Law and Memorandum in Support Thereof," (doc. 100), filed by the government;

5. "Notice of Intent to Offer in Evidence Foreign Records," (doc. 105), filed by the government;

6. "Response to the Government's Motion for Pretrial Determination of Foreign and State Law," (doc. 110), filed by defendant McNab;

7. "Renewed Motion for Evidentiary Hearing on Government's Motion for Determination of Foreign Law" (doc. 113), filed by defendant McNab;

8. "Opposition to Pretrial Determination of Foreign and State Law," (doc. 115), together with a supporting brief, (doc. 116), filed by defendant Robert D. Blandford;

9. "Notice of Intent to Offer in Evidence Foreign Records," (doc. 117), filed by defendant McNab;

10. "Reply to Defendant [McNab's] Response to Motion for Pretrial Determination for Foreign and State Law," (doc. 122), filed by the government;

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[1] The motion to dismiss is premised on multiple grounds, including the contention that "the transactions are not violative of any valid law, treaty, or regulation in Honduras." Mot. To Dism., ¶ 2.

11. "Notice of Intent to Offer in Evidence Foreign Records," (doc. 125), filed by the government;

12. "Motion to Dismiss the Superseding Indictment," (doc. 151), filed by defendant McNab;

13. "Brief in Support of . . . Response to the Government's Motion for Pretrial Determination of Foreign and State Law and In Support of . . . Motion to Dismiss the Superseding Indictment," (doc. 178), filed by defendant McNab;

14. "Summary Brief on Pretrial Determination of Foreign and State Law," (doc. 182), filed by the government;

15. "Summary of Significant Evidence Supporting its Position Regarding the Determination of Foreign Law," (doc. 185), filed by the government;

16. "Supplemental Opposition to Government's Motion for Determination of Foreign Law and In Support of Defendant McNab's Motion to Dismiss," (doc. 186), filed by defendant McNab:

17. "Notice of Filing of Expert Supplementary Affidavit," (doc. 194), filed by defendant McNab;

18. "Supplemental Brief Regarding Foreign Law Issue," (doc. 199), filed by defendant McNab; and

19. All exhibits admitted during the September 27-29, 2000 hearing.

INTRODUCTION

In this criminal proceeding, defendants are charged with, *inter alia*, conspiring to violate and/or violating the Lacey Act, 16 U.S.C. § 3371 *et seq.* *Inter alia*, the Lacey Act makes it unlawful "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish . . . taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any for-

eign law." 16 U.S.C. § 3372(2)(A). In this case, the government contends that defendants violated Honduran law in various ways when they imported or conspired to import spiny lobster tails and shrimp on multiple occasions over a five-year period.[2] So that the court can adequately charge the jury, the government requests the court to "determine" that Honduran law:

> (1) prohibits one to harvest, process, or sell (including the sale/exportation of such

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[2] The second superseding indictment also charges that some of the defendants violated the Lacey Act by importing shrimp and spiny lobsters in violation of Florida law, and the government has requested the court to "determine" the relevant Florida law. As stated on the record during the September 27-29 hearing, none of the parties contest the validity or scope of the applicable Florida law as set forth in the government's motion. There being no dispute between the parties regarding the relevant Florida law, the court concludes that Florida law prohibits:

> 1. the harvesting or possessing of any spiny lobster (*Panulirus argus*) with a tail measurement less than 5 1/2 inches.
>
> 2. the harvesting or possessing of egg-bearing spiny lobster and/or the possessing of spiny lobster or spiny lobster tails from which eggs, swimmerettes, or pleopods have been removed or stripped. The practice of stripping or otherwise molesting egg-bearing spiny lobster in order to remove the eggs is also prohibited.
>
> 3. any person, firm, or corporation to deal in any saltwater products, including lobster tails, without first paying for and procuring a saltwater products dealer license. It is unlawful to sell, deliver, ship, or transport any saltwater products without all invoices of such products having thereon the wholesale dealer license number.

lobster to a buyer outside Honduras for which payment is, made directly or indirectly to a Honduran citizen or company) any lobster the tail of which measures less than five and one-half (5 ½) inches in length;

(2) prohibits one to harvest lobster commercially between March 16 and July 31 of years 1995, 1996 and 1998. In all other years, the closed season runs from December 1 through April 30.

(3) prohibits one to harvest shrimp commercially between February 1 and June 30 of each year;

(4) prohibits one to harvest or destroy the eggs of any aquatic species, including spiny lobster, for profit; This includes a prohibition against the tearing out or, in any other way separating, the eggs from the female lobster, for profit;

(5) prohibits one, commencing on the sixth day after the beginning of the respective lobster or shrimp closed season, to transport, sell, store, or refrigerate lobster and/or shrimp unless the lobster and shrimp were harvested prior to the first day of the closed season;

(6) requires lobster and shrimp fishermen to dock their vessels and unload their catch in a Honduran port prior to exportation. This duty may be fulfilled by the fishermen by either docking the vessel that caught the lobster or shrimp or transferring the catch to a licensed ship that in turn docks and unloads the catch;

> (7) requires that businessmen and those who use any kind of boat for fishing activities or transportation of any fish species protected by law, including lobsters, report in writing to the governmental authorities the outcome of their fishing trip. The captain of any fishing boat has to report the departure and arrival of the boat to governmental authorities, pointing out places where the fishing was done, and the species and amount caught.
>
> (8) prohibits one to export lobster without first processing/packing that lobster in Honduras which includes the packing of lobster into boxes that have been paraffined and labeled with (a) the business name of the firm that makes the product, (b) the weight, (c) that it was "inspected and approved of by the Honduran Ministry of Natural Resources" and (d) the number assigned to the processing company.

The government contends that these points of law are mandated by certain Honduran statutes, regulations, and resolutions. Except as noted below, defendants do not contest the government's interpretation of the relevant Honduran statutes, regulations, and resolutions; rather, defendants' primary contention is that the resolutions upon which the government relies do not satisfy the Honduran constitutional requirements for resolutions and, therefore, are null and void. The parties' contentions and supporting evidence are discussed *infra*.[3],[4]

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[3] Defendants had asserted that they could not be indicted under the Lacey Act when the underlying foreign law provides

[Footnote continued on next page]

Over a 2 ½-day period, the court conducted an evidentiary hearing on the Honduran law issues. Additionally, the court has reviewed the voluminous evidentiary material submitted by the parties before, during, and after the hearing. After due consideration, the court makes the following determinations of foreign law pursuant to 18 U.S.C. § 3505(b)[5] and Fed. R. Crim. P. 12(b)[6] and 26.1.[7]

[Footnote continued from previous page]

only civil penalties or when the foreign government has not prosecuted them under the criminal penalties. Based on the reasons and authorities cited by the government in its briefs, the court previously denied defendants' motion to dismiss to the extent that it was predicated on either of these two grounds.

[4] The government and defendant McNab have submitted a tremendous amount of evidentiary material regarding Honduran law. Given the time constraints on the court, the court cannot possibly address each item of evidence in this written order. Nevertheless, so the record is clear, the court notes that it has carefully reviewed all of the materials submitted in English.

[5] Title 18 U.S.C. § 3505 provides:

> At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record or regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such a motion before trial shall constitute waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

[6] Fed. R. Crim. P. 12(b) provides, *inter alia*:

[Footnote continued on next page]

DISCUSSION

Point of Law 1—Prohibition of harvesting lobster less than 5 1/2 inches in length

The government relies on Resolution No. 030-95 (December 5, 1995) to establish that Honduras law prohibits the harvest and sale of lobster less than 5 1/2 inches in length. That resolution provides in relevant part:

> For the capture of lobster:
>
> > d) The minimum size for the capture of lobster is 5.5 inches or 14.5 centimeters of abdominal length.

Resolution No. 030-95, Third Provision

Point of Law 2—Closed season for harvesting of lobster

Point of Law 3—Closed season for harvesting of shrimp

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter V, Article 41, and Resolutions

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[Footnote continued from previous page]

> Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.

[7] Fed. R. Crim. P. 26.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

No. 001-95 (January 14, 1995), No. 030-95 (December 5, 1995), and No. 031-97 (December 17, 1997), to establish that Honduras law prohibits the harvest of lobster and shrimp during closed seasons. The Fishing Law provides in relevant part:

> The closed season for fishing for shrimp and lobster is fixed as the period between 1 December and 30 April of each year.

The Fishing Law, Chapter V, Article 41.

The three resolutions provide in relevant part:

> FIRST: To establish closing season annually for the capture of Shrimp [and] Lobster . . . in the Atlantic Ocean, during the following periods:
> a) Shrimp, from the 1st of February to the 30th of June.
> b) Lobster, from the 16th of March to the 31st of July.

Resolution No. 001-95 (establishing the closed season for the year 1995).

> FIRST: To establish closing season annually for the capture of all species of shrimp [and] lobster . . . in the Atlantic Ocean and in the coastal lagoon system, during the following periods:
> a) Shrimp, from the 1st of February to the 30th of June.
> b) Lobster, from the 16th of March to the 31st of July.

Resolution No. 030-95 (establishing the closed season for the year 1996).

> FIRST: To establish closing season for the capture of shrimp [and] lobster . . . in the Caribbean Sea and in the coastal lagoon system, during the following time periods:

> a) Shrimp, from the 1st of February to the 30th of June 1998.
> b) Lobster, from the 16th of March to the 31st of July 1988.

Resolution No. 031-97 (establishing the closed season for the year 1998).

The government established that the resolutions were issued by the Honduran Minister of the Department of Agriculture and Livestock and were duly published in *La Gaceta*, the official publication of the Republic of Honduras.

Defendants do not dispute the contents of the three resolutions upon which the government relies to establish Points of Law 1, 2, & 3; rather, they contend that the resolutions are null and void. To support their contention, defendants rely upon a number of legal opinions which the court has carefully reviewed.

Dr. Saul Litvinoff, a professor of law at Louisiana State University, and Efrain Moncada Silva, a professor at the National Autonomous University of Honduras and licensed member of the Honduran bar, testified that the resolutions do not meet the requirements of the Honduran Constitution in order to have "a general binding, effect." Aff. of Litvinoff, p. 6. Specifically, Prof. Litvinoff testified that, under Articles 245 and 248 of the Honduran Constitution, to be valid and binding, the documents must be 1) "issued in the form of a regulation, 2) [] signed by the President and countersigned by the departmental secretary, and 3) published in the official form." *Id.* Prof. Salvia testified similarly.

The court has reviewed the cited portions of the Honduran Constitution and disagrees with the professors' interpretation thereof. Article 245 provides:

> The President of the Republic has the general administration of the States. His powers are: to issue accords and decrees and

> to issue regulations and resolutions in accordance with law.

Article 248 provides:

> The decrees, regulations, accords, orders, and judgments of the President of the Republic must be authorized by the department secretaries or their undersecretaries in proper cases. If they fail to meet these requirements[,] they shall have no legal force.

As the court understands these two constitutional provisions, the President of the Republic of Honduras is constitutionally authorized to issue regulations and resolutions in accordance with law, and if he issues regulations, they must be authorized by the appropriate departmental secretary. However, these two provisions (which appear to be plain and straightforward) do not state (or even suggest) that the president is the only Honduran official legally authorized to issue a resolution. Buttressing the court's reading of these constitutional provisions are two important facts. First, the government presented unrebutted testimony that other Honduran departments (*e.g.*, communications and banking) had issued resolutions as a means of carrying out the laws governing those industries. Second, the testimony of virtually every witness asked was that everyone in the Honduran fishing industry, including defendant McNab and the government officials in the fishing industry, viewed the resolutions as legally binding. Indeed, defendant McNab issued memoranda to his boat captains reminding them of the lobster size limits.

Additionally, Liliana Paz, the General Secretary in the Ministry of Agriculture and Livestock (the Honduran department responsible for the fishery management program), testified that that Honduran Ministry most certainly views the resolutions as legally binding. Secretary Paz is a graduate of the National Autonomous University of Honduras and an attorney licensed in Honduras. She is the highest level attor-

ney within the Ministry of Agriculture and Livestock, and her job duties include providing legal advice to "the Minister in matters having to do with legal affairs, institutional communication, [and] international cooperation." Secretary Paz also has experience clerking for one of the Honduran courts. The court finds her to be well-qualified to speak to the issues regarding the validity and contents of the Fishing Law and the related regulations and resolutions. Upon observing her demeanor, the court finds Secretary Paz to be a very credible witness.

In contrast, the court found the testimony of Prof. Silva to be less than credible, as he testified that he had not, as of the date of his in-court testimony, decided whether he was going to charge defendant McNab for his legal services (including his time spent researching, drafting, and testifying).[8] Thus, it appears that this expert witness for the defense intends to charge a fee akin to a contingency fee. As for Professor Litvinoff, the value of his testimony as to what is required under Honduran law is diminished by the fact that he is not a licensed attorney in Honduras. Additionally, unlike Secretary Paz, neither of these gentlemen regularly interpret the fisheries laws, regulations, and resolutions.

The court also notes that the Fishing Law itself specifically contemplates the implementation of resolutions such as those at issue here in furtherance of the Law. The Fishing Law of 1959, Chapter 11, Article 7, provides in relevant part:

> [The Department of Hunting and Fishing] shall be the only authority to resolve, clarify, and decide all questions raised about the conditions that must be satisfied by fisheries

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[8] Professor Silva was not asked who had paid his travel expenses to America for the purpose of testifying in this matter.

> products, to permit them to be captured, transported or sold for consumption in the markets and for other industrial uses, and everything related to importation, exportation and licensing, to which end it shall announce such resolutions an other measures as it believes necessary for fisheries activities to be as effective as possible.

The Fishing Law of 1959, Chapter II, Article 7.

Defendants correctly point out that elsewhere in the Fishing Law, "[t]he Executive Branch, through the secretariat of Natural Resources, is the superior authority on fisheries and fisheries-related matters, and therefore, may establish and announce . . . [certain] measures [including those related to closed seasons] through regulations." The Fishing Law, Chapter I, Article 5. After review, the court is unable to reconcile Articles 5 & 7. Faced with this statutory dilemma, the court finds the testimony of Secretary Paz to be critical—namely, that the resolutions are valid, that the Honduran government views the resolutions to be valid, and that the Honduran government has acted in accordance with the resolutions.

One other item of evidence submitted by defendants merits a remark. Defendants have submitted a one-sentence ruling issued by the Honduras Supreme Court of Justice which defendants characterize as a judicial statement by the high court that resolutions are not law. One of defendant McNab's witnesses (Honduran attorney Maria Letizia De Guillen) recently petitioned the Supreme Court challenging the constitutionality of two of the resolutions at issue before this court. In denying the petition, the high court stated *in toto*:

> Denied the admission of the petition of unconstitutionality interposed by the way of action by attorney MARIA LETIZIA DE GUILLEN,

> because they recur against two administrative resolutions that do not have the character of law and according to article 184 of the Constitution of the Republic: the recourse of unconstitutionality only proceed against the Law by reason of form or content.

After review, this court understands the ruling to be that the Supreme Court of Justice only reviews the constitutionality of a law (*i.e.*, a statute or other form of legislation enacted by the Honduran legislative branch—National Congress) and that it does not determine the constitutionality of any "lesser" documents (*i.e.*, regulations and resolutions issued by the executive branch) notwithstanding that those "lesser" documents, have the binding force of law. According to defendants, the fact that the Supreme Court declined to address the constitutionality of the resolutions because they are no "law" does not equate to a holding by the high court that he resolutions have no binding legal effect. Defendants' argument goes too far and is simply unsupported. Honduran law clearly encompasses many mechanisms which carry the force of law notwithstanding that the mechanism is not denominated as "law" (and thereby subject to review by the Supreme Court of Justice).

Accordingly, the court concludes that the government has met its burden of establishing that Points of Law 1, 2, & 3 (as set forth on page five of this order) are valid and binding under Honduran law.

Point of Law 4—Prohibition of harvesting egg-bearing lobster or the removal of eggs from lobster

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter VII, Article 70(3), to establish that Honduras law prohibits the harvest and sale of egg-hearing lobster and the tearing out or separating in any other way the eggs from the female lobster. That law provides in relevant part:

> The following offense shall be punished with [a fine of] THREE HUNDRED LEMPIRAS or THREE HUNDRED DAYS imprisonment:
>
> * * * *
>
> 3) Those who destroy or harvest the eggs, or the offspring of fish, chelonians, or other aquatic species for profit.

The Fishing Law, Chapter VII, Article 70(3).

Defendants do not contest the validity of the Fishing Law; rather, they argue that Article 70(3) was written to protect the eggs and young of fish, turtles, and other aquatic species which have been placed in *situ*. To this end, defendants rely on Prof. Litvinoff's supplemental affidavit in which he opines that this statutory provision does not bar the severance of the egg-bearing part of a female lobster or the harvesting of egg-bearing lobsters. Moreover, the professor suggests that the provision does not reach the harvesting of any lobsters, for "the Honduran system has always been specific in its attempts to regulate lobster harvesting activities" and "there is no mention of lobster in this provision."

The court finds that defendants' interpretation of Article 70(3) is strained and unnecessarily limiting. The statutory provision is broadly written and clearly encompasses lobster—which is undisputedly an "aquatic species." Also, there is nothing in the plain language of the provision which indicates that it is limited to eggs in *situ*. Moreover, to read an in *situ* requirement into the statutory provision would render part of the provision an absurdity, for it is difficult to conceive of a situation in which one would destroy eggs in *situ* for profit.

Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 4 (as set

forth on page five of this order) is valid and binding under Honduran law.

Point of Law 5—Only lobster and shrimp harvested during open season may be transported, sold, stored, or refrigerated after 6th day of closed season

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter VII, Articles 28 and 54, to establish that Honduras law prohibits the transport, sale, storage, or refrigeration of lobster and shrimp on or after the sixth day of the closed season unless the lobster and shrimp were harvested prior to the first day of the closed season.

The Fishing Law provides in relevant part:

> The sale and transport of species which are canned, salted, smoked, or prepared by industrial means and were caught prior to the start of their respective closed seasons are also authorized at all times.

The Fishing Law, Chapter IV, Article 28.

> The transport and sale of species in closed seasons . . . is permitted until the fifth day after the respective closed season has begun for the purpose of selling off existing quantities which were captured prior to the start of said closed season.

The Fishing Law, Chapter V, Article 54.

Defendants have not challenged this Point of Law or the underlying law from which it is derived. Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 5 (as set forth on page five of this order) is valid and binding under Honduran law.

Point of Law 6—Fishermen must dock, in a Honduran port, the vessel which caught lobster or shrimp and unload catch or

transfer the catch to a licensed vessel that in turns docks and unloads the catch in a Honduran port.

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter VII, Article 30, to establish that Honduras law requires lobster and shrimp fishermen to dock their vessels and unload their catch in a Honduran port prior to exportation. Secretary Paz testified that, although not specifically authorized by the Fishing Law, the Honduran government deemed this requirement to be satisfied by either the docking of the vessel that caught the lobster or shrimp or the transferring of such catch to a licensed ship that in turn docks and unloads the catch in a Honduran port.

The Fishing Law provides in relevant part:

> Fishermen shall be required to dock their vessels and unload their catch in Honduran ports.

The Fishing Law, Chapter IV, Article 30.

Defendants have not challenged this Point of Law or the underlying law from which it is derived. Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 6 (as set forth on page five of this order) is valid and binding under Honduran law.

Point of Law 7—Reporting requirements

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter VII, Articles 35 & 37, to establish that Honduras law requires businessmen and those who use any kind of boat for fishing activities or transportation of any fish species protected by law, including lobsters, must report in writing to government authorities the outcome of their fishing trip. The captain of any fishing boat must report the departure and arrival of the boat to government authorities, pointing out places where fishing was done and listing the species and amount caught.

The Fishing Law provides in relevant part:

> Businessmen, shipowners, employers, fishermen and sailors, as applicable to each business, boat, ship, or transport of each class dedicated to the fishing or transport of any of the species protected by this Law, are required to give to the respective officials an account or report, in writing, of the results of the fishing or fishing expedition, and to have the merchandise examined to verify whether regulatory requirements have been met, and to obtain the statistical data, and to allow their books to be reviewed.

The Fishing Law, Chapter IV, Article 35.

> All fishing boat captains shall report to the appropriate office when they depart for work and when they return, indicating fishing places, species and quantities caught.

The Fishing Law, Chapter IV, Article 37.

Defendants have not challenged this Point of Law or the underlying law from which it is derived. Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 7 (as set forth on page six of this order) is valid and binding under Honduran law.

Point of Law 8—Inspection, processing, and packing requirements

The government relies on Agreement No. 0008-93 (January 13, 1993), Articles 3, 4, & 49, to establish that Honduras law prohibits the exportation of lobster without first having it officially inspected for health and sanitation and processed/packed at an approved establishment in Honduras, which includes the packing of lobster into boxes that have been paraffined and labeled with the business name of the

firm that makes the product, the weight, that it was "Inspected and Approved of by the Honduran Ministry of Natural Resources" and the number assigned to the processing company. This "Agreement" is a regulation under Honduran law, it was duly published in *La Gaceta*, and defendants do not dispute its validity. As Secretary Paz testified, the Agreement contains the inspection, industrial, health, and hygiene regulations for the protection of fishery products.

Agreement No. 0008-93 provides in relevant part:

> The ones subject to the Official Inspection are the fishing vessels, storing centers and plants that capture, gather, industrialize and pack fishing products.
>
> In agreement with the present Regulation only the products previously inspected can be offered for sale.
>
> Products for export can only be the ones processed in plants approved for that purpose.

Agreement No. 0008-93, Article 3.

> Fish, crustaceans, molluscs, anurous reptiles and mammals of comestible type, from fresh or salt water, assigned for internal consumption or export and by extension are also included the subproducts obtained from the same mentioned products.

Agreement No. 0008-93, Article 4.

For the icing and packing of the products it will be observed:

> h) The packing must be made in boxes with the appropriate label, treated with paraffin and the size must have been approved

> during the registration process. They must have the following legend:
> 1st) The name or trade name of the business that manufactured the product.
> 2nd) The weight.
> 3rd) The legend "Product of Honduras" that can be also placed in another language.
> 4th) A 3 (three) centimeter circle, "Inspected and Approved by the Department of Natural Resources of Honduras" and the number assigned to the establishment doing the processing.
> 5th) In addition, it can have printed the different denominations of the size of the product.

Agreement No. 0008-93, Article 49(h).

Defendants do not object to the first part of this statement of law, *i.e.*, that it is prohibited under Honduran law to export lobster without first having it officially inspected for health and sanitation and processed at an approved establishment in Honduras. Additionally. all parties agree that a fishing vessel can constitute a processing "plant," provided it meets the detailed requirements of a processing plant under the Fishing Law. Rather, the dispute between the parties turns on the definition of "processing," a term that is not specifically defined in the Agreement.

Based on the evidence presented, the court concludes that "processing" fish products for exportation includes inspection, grading, the preparation of the products for packaging, and the packaging itself. Secretary Paz testified that processing includes packaging. Mike Powers of Garden Restaurants testified that partial processing can occur onboard the fishing vessel, including the measuring and cutting off the lobster tails, washing, deveining, and dipping the product into an

approved preservative. However, the "process" is not complete until the product is graded, the official inspector (or his selected technician) inspects and approves the product, and it is properly packaged for exportation.

Finally, defendants make much of the fact that Agreement 0008-93, Article 5(t), permits the use of plastic as part of the packing materials.[9] However, Article 49 of Agreement 0008-93 plainly requires that the product ultimately be placed in a paraffined box prior to exportation, with the box appropriately labeled with the requisite information. Additionally, Secretary Paz testified that packing lobster in plastic bags—without more—for exportation is not adequate under Honduran law.

Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 8 (as set forth on page six of this order) is valid and binding under Honduran law.

CONCLUSION

It is ORDERED that defendant McNab's "Motion to Dismiss Counts One through Twelve and Counts Twenty-Eight Through Forty-Three of the Indictment," (doc. 53), and "Motion to Dismiss the Superseding Indictment," (doc. 151), are DENIED.

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[9] Agreement 0008-93, Article 5(t) provides:

> Packing Materials: All the materials such as sheets of aluminum, plastic, wax paper, cardboard boxes and others, used to cover and protect the fishing products, and that have been approved by the Department.

The fact that the Agreement permits the use of plastic as a packing material is not surprising given the extensive regulations regarding the use of ice.

Nothing in this order should be construed as expressing, an opinion or making a finding as to the innocence or guilt of any of the defendants. It will be for the jury to decide whether the government proves any of the defendants guilty of any of the charges beyond a reasonable doubt. The fact that the court has "determined" the applicable Honduran law does not mean that the government has proven that any of the defendants have violated Honduran law or that the lobster or shrimp at issue in this case were taken, possessed, etc., in violation of Honduran law.

The Clerk is DIRECTED to send a copy of this order to counsel for all parties by facsimile.

DONE this 12th day of October, 2000.

/s/
RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA [Filed August 28, 2001]

v. CRIMINAL ACTION NO. 1:00-00079-(1, 2, 3 & 4)-RV

DAVID HENSON MCNAB
ROBERT D. BLANDFORD
ABNER SCHOENWETTER
DIANE H. HUANG

ORDER

This matter is before the court on the following documents:

1. "Alternative Motions Based on Honduran Law Developments," (doc. 336), filed by **defendant David Henson McNab**; [1],[2]

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[1] The "Alternative Motions"—which are premised on essentially the same grounds—are a "Motion to Dismiss," a "Motion for New Trial Based on Newly Discovered Evidence," and a Motion for Redetermination of Foreign Law."

[2] **Defendants Robert D. Blandford** and **Abner J. Schoenwetter** adopted defendant McNab's "Alternative Motions," (docs. 346 & 342, respectively). **Defendant Diane H. Huang** filed her own motion, also titled "Alternative Motions Based on Honduran

[Footnote continued on next page]

2. "Notice of Filing Regarding Hygiene Regulation Repeal," (doc. 325), filed by **defendant McNab**;

3. "Notice of Filing Regarding Annulment Action," doc. 324), filed by **defendant McNab**;

4. "Notice of Filing Regarding Fishing Law Changes," (doc. 326), filed by **defendant McNab**;

5. Supplemental Filing in Support of Alternative Motions," (doc. 341), filed by **defendant McNab**;

6. Second Supplemental Filing in Support of Alternative Motions, (doc. 371), filed by **defendant McNab**;

7. "Second Response to Defendants' Alternative Motions Based on Issues of Honduran Law," (doc. 387), filed by the government;[3]

and

8. Reply Declaration, (doc. 388), filed by **defendant McNab**.[4]

[Footnote continued from previous page]

Law Developments," (doc. 344), which is predicated on essentially the same grounds and evidence as McNab's alternative motions. For simplicity's sake, the court will refer only to the alternative motions filed by **defendant McNab**, although the court's ruling applies to all four defendants.

[3] The government's "Second Response" supercedes the government's first response. (doc. 378).

[4] During the hearing held by the court on August 17, 2001, the court granted **defendant McNab's** "Motion for Leave to File Reply Declaration," (doc. 388), without objection by the government.

INTRODUCTION

Following a jury trial, defendants were convicted of, *inter alia*, conspiring to violate the Lacey Act, 16 U.S.C. § 3371 *et seq.* Stated generally, the Lacey Act makes it unlawful to import into the United States fish or wildlife that has been taken or acquired in violation of another country's laws. In this case, the government contended that defendants violated Honduran law in various ways when they conspired to import spiny lobster tails on multiple occasions over a five-year period. Prior to trial, the court made a number of determinations with respect to Honduran law pursuant to 18 U.S.C. § 3505(b)[5] and Fed. R. Crim. P. 12(b)[6] and 26.1.[7]

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[5] Title 18 U.S.C. § 3505 provides:

> At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record or regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such a motion before trial shall constitute waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

[6] Fed. R. Crim. P. 12(b) provides, *inter alia*:

> Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.

[7] Fed. R. Crim. P. 26.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony,

[Footnote continued on next page]

In his pending post-trial "alternative motions," **defendant McNab** has requested the court to revisit its Honduran law determinations, at least as to three particular points. Because the court's jurisdiction was potentially impacted by the newly-raised grounds, the court ordered the government to file a response and, following that response, held a hearing on August 17, 2001. After full consideration of the arguments of counsel and the evidence submitted, the court concludes that the alternative motions are due to be denied.

DISCUSSION

Point of Law 1—Lobster Size Limits—Annulment of Resolution 030-95

In its original ruling on Honduran law, the court determined that Honduran Resolution 030-95, Third provision, prohibits the harvesting of spiny lobsters which are less than 5 1/2 inches in length. Defendant McNab contends that Resolution 030-95 has been annulled by a Honduran court and that, pursuant to Article 96 of the Honduran Constitution, the annulment operates retroactively in favor of a criminal defendant such as himself. The annulment action was instituted by McNab following this court's original ruling on Honduran law.

The government does not contest defendant McNab's assertion that the Honduran "Court of the First Instant of Administrative Law" declared Resolution 030-95 to be voided. Rather, the government points out, correctly so, that the Honduran administrative court declared the resolution to be

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[Footnote continued from previous page]

> whether or not submitted by a party or admissible under the Federal rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

void "but . . . only for purposes of [its] annulment and future inapplicability. This Resolution does not confer any right to claims." Although the legal meaning of this limitation language under Honduran law is not entirely clear to the undersigned, the court concludes that the administrative court intended to give its pronouncement prospective, rather than retroactive, effect.[8]

Even if the administrative court's voidance of Resolution 030-95 should be given retroactive effect, the express language of the administrative court's ruling provides that it will not be a final judgment if an appeal is timely taken. It is undisputed that the Honduran government (which contested the annulment action before the administrative court) timely appealed the ruling. Consequently, the administrative ruling is not a final judgment, and it has no legal effect in Honduras. Because the administrative decision is not Honduran law now and because the evidence establishes that the Honduran government continues to enforce Resolution 030-95, the court concludes that Resolution 030-95 continues to be valid under Honduran law.

Point of Law 2—Processing/Packaging Rules—Repeal of Agreement 0008-93

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[8] It would seem that a judge could not unilaterally declare the effect of his/her ruling to be non-retroactive, for Article 96 of the Honduran Constitution would appear to "trump" any such declaration. This court need not decide that issue, however, because the government submitted evidence which the court understands to mean that an Honduran administrative court lacks the power to void a resolution with respect to criminal acts. *See* affidavit of Jose Bernardo Torres Umanzor ("since the judgment deals with an Administrative and not a Criminal matter, it has no retroactive effect and only has effects for its future inapplicability.").

In its original ruling, the court concluded that Agreement No. 0008-93 prohibits the exportation of lobster without first having it officially inspected for health and sanitation and processed/packed at an approved establishment in Honduras, which includes the packing of lobster into boxes that have been paraffined and labeled with (a) the business name of the firm that makes the product, (b) the weight, (c) that it was "Inspected and Approved of by the Honduran Ministry of Natural Resources" and (d) the number assigned to the processing company.

It is undisputed that Agreement 0008-93 was issued pursuant to Decree No. 40 of May 16, 1973. It is also undisputed that Decree No. 40 was expressly repealed effective January 13, 1995, by Decree No. 157-94. From this, **defendant McNab** argues that the repeal of Decree No. 40 operated as a repeal of Agreement 0008-93. In support of this position, **defendant McNab** offered the affidavit of Ramiro Lozano, an Honduran attorney and law professor, who opined that "regulations are automatically repealed when the law under which they were issued is repealed."[9]

The Honduran Civil Code provides in relevant part:

> Article 42—A law may be revoked totally or partially by another law.
>
> Article 43—The revocation of the law may be express or tacit.
>
> It is express when the new law expressly revokes the law that antecedes it.
>
> It is tacit when the new law contains rules that may not be conciliated with the old law.

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[9] Defendant McNab offered the affidavits of other Honduran attorneys who offered similar, if not identical, opinions.

> Article 44—The express repeal may be total or partial, as set forth by the repealing law. The tacit repeal leaves in effect in the previous law anything not in conflict with the provisions of the new law, even though both versions may cover the same matter.

As the government points out, one of the objectives of the new decree (No. 157-94) was "to strengthen the phytozoosanitation, mainly in that which refers to the . . . control of products that are of animal and plant origin." Relying on Article 44 of the Honduran Civil Code, the government contends that "Agreement 0008-93 remained in effect following the repeal of Decree No. 40, at the very least to the extent that it did not impinge on the provisions of the new law." The court agrees. To conclude otherwise would mean that the passage of a law intended to strengthen the existing law would result in a weaker, if not impotent, new law during that window of time until the appropriate ministry or agency had sufficient time to draft, and the appropriate governmental official(s) to sign and publish, new regulations. Such a result is untenable. If the Honduran National Congress had simply repealed Decree No. 40 without passing a new decree covering the same area of the law, then this court would readily conclude that Agreement 0008-93 no longer carried the force of law. That is not the case here, however. At all relevant times a decree existed covering the area of phytozoosanitation, and Agreement 0008-93 continued in effect when the new decree became effective, at least to the extent that Agreement 0008-93 was not inconsistent with the new decree.

There are two additional facts which buttress the court's conclusion. First, the Honduran governmental officials responsible for the enforcement of Decree No. 40, Decree No. 157-94, and Agreement 0008-93 continued to enforce Agreement 0008-93 after Decree No. 157-94 was enacted.

Second, when the Honduran government decided to create new regulations for the enforcement of Decree No. 157-94, it did so by the passage of Accord No. 1081-99 five years after Decree No. 157-94 became effective. Decree No. 1081-99 specifically repealed Agreement 0008-93. If Agreement No. 0008-93 had been "automatically" repealed by the mere passage of Decree No. 157-94 in 1994 as **defendant McNab** argues, then there would have been no reason for Honduras to expressly repeal Agreement 0008-93 in 1999 as so provided in Accord No. 1081-99.

Accordingly, the court concludes that Agreement 0008-93 remained in effect following the passage of Decree No. 157-94 and up to the passage of Accord No. 1081-99 and, therefore, was in effect at all times relevant to the charged conduct in the Second Superseding Indictment.

Point Three—Egg-Bearing Lobsters—Amendment of Article 70(3) of the Fishing Law

Defendant McNab correctly notes that Article 70 of the Fishing Law was amended by the Honduras National Congress in Decree No. 245-2000, which became effective on February 5, 2001. **Defendant McNab** also correctly notes that the amended Article 70 reenacted and restated some of the prohibitions of the former Article 70. As this court determined in its original ruling, the (now) former Article 70 prohibited the harvesting of egg-bearing lobsters. The amended Article 70 does not contain a specific prohibition against the harvesting of egg-bearing lobsters. The absence of a specific prohibition regarding the harvesting of egg-bearing lobster, combined with Article 96 of the Honduran Constitution (which provides that a change in the law does not have a retroactive effect except in criminal cases when the change benefits the accused), constitute the basis for **defendant McNab's** assertion that all counts (and convictions) predicated on a violation of the former Article 70 are due to be dismissed.

It is true that the Honduran National Congress reworked Article 70. The amended legislation contains 10 specific prohibitions and 1 catch-all provision. Namely, the following conduct is sanctionable:

(a) Fishing with chemical or explosive elements;

(b) Fishing carried out by unlicenced persons or persons with expired licenses;

(c) Fishing with prohibited gear;

(d) Catching for commercial purposes during the closed season;

(e) Clearing mangrove swamps or destroying ecosystems in general;

(f) Polluting with any substance the maritime or continental waters;

(g) Catching, destroying, or removing protected hydrobiological species, especially manatees;

(h) Shipowners or captains of vessels that fail to report their catch;

(i) Carrying out scientific research without a permit from the National Fisheries Authority;

(j) Shipowners or captains of vessels that fail to comply with the provisions related to the installation of the Sea Turtle Excluding Devices (DETs) as set forth by the National Fisheries Authority; and

(k) Any other activity not expressly mentioned in the preceding items indicated with letters but which is analogous.

In response, the government observes that the intent of the Honduran National Congress in amending Article 70 was to increase the monetary sanctions to reflect present currency valuations, thereby putting some teeth into the law:

> WHEREAS the current Fisheries Law . . . sets forth sanctions of an administrative nature, the amounts of which do not represent coercive measures that reflect the gravity of the violations committed, so that it is necessary to revise these sanctions according to the importance of the case and the current value of the national currency.

The government urges that those specific prohibitions contained in the former Article 70 but not in the amended Article 70 (including the egg-bearing lobster prohibition at issue here, as well as the prohibitions of catching lower weight fish, crustaceans, and chelonians, and catching a quantity too large to be transported in one's own vessel) remain in effect except to the extent that they are inconsistent with the new prohibitions. Because there is nothing in the amended Article 70 which is inconsistent with a prohibition against harvesting egg-bearing lobster, the government contends that the harvesting of egg-bearing lobster prohibition remains in effect, if not on its own, then at least through the catch-all provision "(k)" of the amended Article 70.

Of the three changes in Honduran law which **defendant McNab** advances in his alternative motions, it is this ground which gives the court the most pause. It is troubling that the Honduran National Congress would specifically "bring over" certain prohibitions from the former Article 70 into the amended Article 70, and choose not to specifically "bring over" other prohibitions, only for this court to conclude that the prohibitions not expressly brought over are still valid law to the extent that they are not inconsistent with the amended Article 70. Nevertheless, after full consideration, the court concludes that that is exactly what this court must do in light of Honduran Civil Code Articles 42, 43 & 44. This conclusion is buttressed by the stated purpose of the amendment—to increase the penalties—not to reduce the prohibited con-

duct. This conclusion gains additional support from the affidavit of Liliana Paz, General Secretary in the Ministry of Agriculture and Livestock, the department of the Honduran government ultimately responsible for the enforcement of the fisheries law, in which she states (albeit without much elaboration) that "the destruction or harvest of eggs of aquatic species remains prohibited under Honduran law, subject to greater penalties."

Accordingly, the court concludes that the harvesting and destruction of egg-bearing lobsters continues to be prohibited conduct under Honduran law.

CONCLUSION

After due consideration, it is

ORDERED that defendant McNab's alternative motions are DENIED for the foregoing reasons.

The Clerk is DIRECTED to send a copy of this order to counsel for all parties by facsimile.

DONE this 28th day of August, 2001.

/s/
RICHARD W. VOLLMER, JR
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 29, 2003
THOMAS K. KAHN
CLERK

No. 01-15148

D. C. Docket No. 00-00079-CR-1-RV

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

DAVID HENSON MCNAB,
ROBERT D. BLANDFORD, et al., Defendants-Appellants.

No. 02-10810

D. C. Docket No. 00-00079-CR-CB

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

ABNER SCHOENWETTER,

ROBERT D. BLANDFORD, Defendants-Appellants.

No. 02-11264

D. C. Docket No. 00-00079-CR-1-RV

UNITED STATES OF AMERICA, Plaintiff-Appellee

versus

DAVID HENSON MCNAB,
ABNER SCHOENWETTER, et al., Defendants-Appellants

Appeals from the United States District Court
for the Southern District of Alabama

(May 29, 2003)

Before HULL, WILSON and FAY, Circuit Judges.

ORDERED:

The petitions for rehearing are granted in part by deleting entirely footnote 24 from the Court's opinion which was issued on March 21, 2003. The Court will issue a substituted opinion making that deletion. The Court otherwise denies the petitions for rehearing of defendants' McNabb, Schoenwetter, Huang, Blandford and Embassy of Honduras.

No member of this Court having requested a poll, we deny the suggestion for rehearing en banc. *See* Fed. R. App. P. 35(a); Eleventh Circuit Rule 35-5.

FAY, Circuit Judge, dissents.

APPENDIX E

[Filed August 28, 2001]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)
V.	
DAVID HENSON MCNAB	CASE NUMBER: 1:00-CR-00079-001
THE DEFENDANT:	Donald Briskman, J. Patrick Courtney, III and Patrick Sims Defendant's Attorney

( ) pleaded guilty to count(s) __.
( ) pleaded nolo contendere to count(s) __ which was accepted by the court.
(X) was found guilty on count(s) 1-12, 28-43 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
18 U.S.C. § 371	Conspiracy	05/10/2000	1
18 U.S.C. §§ 545 & 2	Importation contrary to law	02/04/1999	2-12

18 U.S.C. §§ 1957 & 2	Fraudulent transactions of funds derived from unlawful activity	12/11/1998	28-42
18 U.S.C. §§ 1957 & 1956(h)	Conspiracy to engage or attempt to engage in monetary transactions	05/10/2000	43

The defendant is sentenced as provided in pages 2 through 5 of this judgment. Pre-sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) __.

( ) Count(s) __ is/are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Social Security No.: NONE

08/07/2001
Date of Imposition of Judgment

Defendant's Date of Birth: 01/17/1952
Defendant's U.S.M. No.: 39028-018

Defendant's Residence	/s/
Address:	RICHARD W. VOLLMER,
Roatan (Bay Island)	JR.
Honduras, Central America	SENIOR UNITED STATES DISTRICT JUDGE
Defendant's Mailing	8-27-01
Address:	Date

JUDGMENT ENTERED ON DOCKET

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 97 months, said term consisting of 60 months as to each of counts 1 through 12 and 97 months as to each of counts 28 through 42 and 43, all such terms to run CONCURRENTLY:

( ) Special Conditions:
( ) The court makes the following recommendations to the Bureau of Prisons:
( ) The defendant is remanded to the custody of the United States Marshal.
( ) The defendant shall surrender to the United States Marshal for this district:
  ( ) at ____ a.m./p.m. on ___.
  ( ) as notified by the United States Marshal
(X) The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  ( ) before 2 p.m. on ___.
  (X) as notified by the United States Marshal. *NOTE TO U.S. MARSHAL: Defendant allowed to remain on bond pending appeal to the 11th Circuit Court of Appeals and may self-surrender to the institution after a decision is rendered on appeal;*
  ( ) as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 YEARS as to each of counts 1-12, 28-42 & 43, all such terms to ran CONCURRENTLY:

(X) Special Conditions:

1. Immediately after incarceration, the defendant is to be delivered to a duly authorized Immigration official for possible DEPORTATION; If deported, the defendant is to remain outside the United States pursuant to 18 U.S.C. § 3583(d). If not deported, within 72 hours of release from custody of the Bureau of Prisons or Immigration authorities, the defendant shall report in person to the probation office in the district to which he is released and abide by their instructions;

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

( ) The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

(X) The defendant shall not possess a firearm, destructive device, or any other dangerous weapon

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall report to the probation office in the district to

which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall comply with the standard conditions that have been adopted by this court (Probation Form 7a).

The defendant shall also comply with the additional conditions on the attached page (if applicable).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer,

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the prob. officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement office,

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the prob. officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$2,800.00**	**$100,000.00**	

* * * * *

SCHEDULE OF PAYMENTS

* * * * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

( ) **Joint** and Several:

( ) The defendant shall pay the cost of prosecution.

( ) The defendant shall pay the following court cost(s):

(X) the defendant shall **forfeit** the defendant's interest in the following property to the United States:

EIGHT HUNDRED THOUSAND AND NO/100 DOLLARS ($800,000.00)

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal; (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX F

[Footnote 24 of original panel decision, deleted on rehearing]

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MARCH 21, 2003
THOMAS K. KAHN
CLERK

No. 01-15148

D. C. Docket No. 00-00079-CR-1-RV

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

DAVID HENSON MCNAB,
ROBERT D. BLANDFORD, et al., Defendants-Appellants.

No. 02-10810

D. C. Docket No. 00-00079-CR-CB

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

ABNER SCHOENWETTER,
ROBERT D. BLANDFORD, Defendants-Appellants.

No. 02-11264

D. C. Docket No. 00-00079-CR-1-RV

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

DAVID HENSON MCNAB,
ROBERT D. BLANDFORD, et al., Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Alabama

(March 21, 2003)

Before HULL, WILSON and FAY, Circuit Judges.

WILSON, Circuit Judge:

* * * * *

Thus, we must decide whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to follow the Honduran government's original position.[24]

---

[24] The Executive Branch of the United States government, represented here by the Department of Justice, has taken the posi-

[Footnote continued on next page]

* * * * *

[Footnote continued from previous page]

tion that the various Honduran laws in issue are valid and specifically that under Honduran law the Honduran court's judgment regarding Resolution 030-95 applies only prospectively. The Executive Branch, in effect, has declined to accept the position of the Honduran Embassy as determinative as to Honduran law.

There is no authority directing courts making foreign law determinations to hold as determinative declarations made by foreign embassies as to their laws. Instead, this Court considers the Honduran Embassy's position as evidence of what the Honduran law is in conjunction with the other evidence in this case, which conflicts with the Honduran Embassy's position. Our Executive Branch's decision not to accept as determinative the position of a foreign embassy on foreign law inevitably touches upon considerations of foreign policy, which typically involve nonjusticiable "political questions" committed to the other branches of government. *See Baker v. Carr*, 369 U.S. 186, 211-12 (1962) (recognizing that many questions touching foreign relations are political questions); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). Such is the case here because a judicial decree that the Honduran Embassy's position is determinative would place this Court in conflict with the Executive Branch with respect to the amount of deference due a foreign government official's position. *See Baker*, 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . . .").

APPENDIX G

The Fifth Amendment's Due Process Clause provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

U.S. Const. amend. V.

APPENDIX H

TITLE 16—CONSERVATION

CHAPTER 53—CONTROL OF ILLEGALLY TAKEN FISH AND WILDLIFE

* * * * *

§ 3372. Prohibited acts

(a) Offenses other than marking offenses

It is unlawful for any person—

(1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of title 18)—

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;[1]

(4) to attempt to commit any act described in paragraphs (1) through (4).[2]

(b) Marking offenses

It is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph (2) of section 3376(a) of this title.

(c) Sale and purchase of guiding and outfitting services and invalid licenses and permits

(1) Sale

It is deemed to be a sale of fish or wildlife in violation of this chapter for a person for money or other consideration to offer or provide—

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(2) Purchase

It is deemed to be a purchase of fish or wildlife in violation of this chapter for a person to obtain for money or other consideration—

---

[1] So in original. Probably should be followed by "or".

[2] So in original. Probably should refer to pars. (1) through (3).

(A) guiding, outfitting, or other services; or

(B) a hunting or fishing license or permit;

for the illegal taking, acquiring, receiving, transporting, or possessing of fish or wildlife.

(d) False labeling offenses

It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be—

(1) imported, exported, transported, sold, purchased, or received from any foreign country; or

(2) transported in interstate or foreign commerce.

TITLE 16—CONSERVATION

CHAPTER 53—CONTROL OF ILLEGALLY TAKEN FISH AND WILDLIFE

* * * * *

§ 3373. Penalties and sanctions

(a) Civil penalties

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, and any person who knowingly violates section 3372(d) of this title, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation: *Provided*, That when the violation involves fish or wildlife or plants with a market value of less than $350, and involves only the transportation, acquisition, or receipt of fish or wildlife or plants taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for violation of said law, treaty, or regulation, or $10,000, whichever is less.

(2) Any person who violates section 3372(b) of this title may be assessed a civil penalty by the Secretary of not more than $250.

(3) For purposes of paragraphs (1) and (2), any reference to a provision of this chapter or to a section of this chapter

shall be treated as including any regulation issued to carry out any such provision or section.

(4) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which a person may have taken or been in possession of the said fish or wildlife or plants.

(5) Any civil penalty assessed under this subsection may be remitted or mitigated by the Secretary.

(6) In determining the amount of any penalty assessed pursuant to paragraphs (1) and (2), the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, ability to pay, and such other matters as justice may require.

(b) Hearings

Hearings held during proceedings for the assessment of civil penalties shall be conducted in accordance with section 554 of title 5. The administrative law judge may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents, and may administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents

before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(c) Review of civil penalty

Any person against whom a civil penalty is assessed under this section may obtain review thereof in the appropriate District Court of the United States by filing a complaint in such court within 30 days after the date of such order and by simultaneously serving a copy of the complaint by certified mail on the Secretary, the Attorney General, and the appropriate United States attorney. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed, as provided in section 2112 of title 28. If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Secretary, the Secretary may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty de novo.

(d) Criminal penalties

(1) Any person who—

(A) knowingly imports or exports any fish or wildlife or plants in violation of any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title), or

(B) violates any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350,

knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation shall be fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(3) Any person who knowingly violates section 3372(d) of this title—

(A) shall be fined under title 18, or imprisoned for not more than 5 years, or both, if the offense involves—

(i) the importation or exportation of fish or wildlife or plants; or

(ii) the sale or purchase, offer of sale or purchase, or commission of an act with intent to sell or purchase fish or wildlife or plants with a market value greater than $350; and

(B) shall be fined under title 18, or imprisoned for not more than 1 year, or both, if the offense does not involve conduct described in subparagraph (A).

(e) Permit sanctions

The Secretary may also suspend, modify, or cancel any Federal hunting or fishing license, permit, or stamp, or any license or permit authorizing a person to import or export fish or wildlife or plants (other than a permit or license issued pursuant to the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. 1801 et seq.]), or to operate a quarantine station or rescue center for imported wildlife or plants, issued to any person who is convicted of a criminal violation of any provision of this chapter or any regulation issued hereunder. The Secretary shall not be liable for the payments of any compensation, reimbursement, or damages in connection with the modification, suspension, or revocation of any licenses, permits, stamps, or other agreements pursuant to this section.

APPENDIX I

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

CHAPTER 19—CONSPIRACY

* * * * *

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

APPENDIX J

[1994 United States Code]

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

CHAPTER 27—CUSTOMS

* * * * *

§ 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intend to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined under this title or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evi-

dence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

APPENDIX K

[1994 United States Code]

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

CHAPTER 95—RACKETEERING

* * * * *

§ 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, re-

gardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) kidnapping, robbery, or extortion; or

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978);

(C) any act or acts constituting a continuing criminal enterprise, a that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espio-

nage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1708 (theft from the mail), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2319 (relating to copyright infringement), or section 2320 (relating to trafficking in counterfeit goods and services), of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

ENVIRONMENTAL CRIMES

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transactions or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) NOTICE OF CONVICTION OF FINANCIAL INSTITUTIONS.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or

section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

[1994 United States Code]

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

PART I—CRIMES

CHAPTER 95—RACKETEERING

* * * * *

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section—

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

APPENDIX L

FILED IN OPEN COURT
SEP 26 2000
CHARLES R. DIARD, JR.
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	CRIM. NO. 00-00079-CB USAO No.: 99R00060
vs.	
DAVID HENSON MCNAB, ROBERT D. BLANDFORD, ABNER J. SCHOEN-WETTER and DIANE H. HUANG	Violations: 16 USC § 3372(a)(2)(A) 16 USC § 3373(d)(1) 16 USC § 3372(d) 16 USC § 3373(d)(3)(A)(i) 18 USC § 371 18 USC § 545 18 USC § 982(a) 18 USC § 1503(a) 18 USC § 1956(h) 18 USC § 1957

SECOND SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

ALLEGATIONS COMMON TO ALL COUNTS

At all relevant times:

1. **DAVID HENSON MCNAB ("MCNAB")** is a citizen of Honduras and the President and/or owner of Caribbean Dream Company, a Cayman Island corporation ("CDC"); and of Caribbean Fisheries, Inc. and McShip, Inc., both Honduran corporations. Through these companies, **MCNAB** operates one of the largest commercial lobster fishing enterprises in Honduras.

2. **ROBERT D. BLANDFORD ("BLANDFORD")** is the President of two corporations, a seafood import/export company called Seamerica Corporation ("Seamerica") and a second seafood company called Primestar Foods Incorporated ("Primestar"), both incorporated in Florida

3. **ABNER J. SCHOENWETTER ("SCHOENWETTER")** is an advisor to Seamerica, President of a seafood import/export business called Horizon Seafood, and owner and corporate officer of a company called Triangle Transport Systems, Inc. ("Triangle Transport"), all incorporated in Florida. **SCHOENWETTER** also is a partial owner of Mariscos Islenos, a seafood processing company located in Honduras.

4. **DIANE H. HUANG ("HUANG")** is a supervisory employee of a seafood import-export company incorporated in California called American Ex-Im Corporation ("Ex-Im"), and until approximately July 15, 1999, was a registered agent and/or corporate officer of another seafood processing company incorporated in Florida called Seadeli, Inc. **HUANG** also is the sole Director of Besta Corporation, a New Jersey corporation.

BACKGROUND

5. The Caribbean (or Florida) spiny lobster (*Panulirus argus*) ("spiny lobster'') is found in salt waters from Florida to Brazil, including the waters off Honduras, and supports one of the world's largest commercial lobster fisheries. The spiny lobster is one of Honduras' most important natural re-

sources. Honduras regulates the commercial fishing of spiny lobster in order to prevent the over-exploitation and subsequent collapse of this valuable resource and thereby protect the jobs and businesses that depend upon it. The United States, as the largest importer and consumer of Honduran spiny lobster, also has a significant interest in a commercially sustainable harvest. In addition, biologists believe that the offspring of lobster populations off the Western Caribbean coast is the primary source for replenishing the lobster stocks in the Southeast United States.

6. Spiny lobsters must mature to a certain size and/or age, typically at least 5.5 inches in tail length, before they are able to reproduce. Thus, to promote reproduction and preserve this renewable resource, both the State of Florida and Honduras have established a size limit for spiny lobster of five and one half inches in tail length. Additionally, both the State of Florida and Honduras protect female lobsters that are in the egg-bearing stage of reproduction by prohibiting their harvest.

7. Both the State of Florida and Honduras have established closed seasons during which it is illegal to harvest or possess spiny lobsters. The closed season allows the lobsters to reproduce and, when complied with, ensures a stable lobster population to support a commercially sustainable harvest. For the same reasons, Honduras has established a closed season for shrimp.

8. Honduras also requires that lobster and shrimp fisherman unload their catch in a Honduran port prior to exportation and that businessmen who use a boat for lobster fishing activities or the transportation of lobster, as well as fishing boat captains, comply with extensive reporting requirements so that ~~the resource~~ can be properly monitored and managed.

9. Honduras requires that all lobster taken in Honduran waters must be officially inspected for health and sanitation and processed/packed (including packing the lobster in prop-

erly labeled boxes) at a government-approved establishment in Honduras prior to export. Processing in Honduras further ensures that government officials are able to maintain accurate data on the lobster harvested in Honduran waters. This information allows them to properly manage this resource for future generations.

10. **MCNAB, BLANDFORD, SCHOENWETTER**, and **HUANG** entered into an agreement to purchase and sell illegal spiny lobster tails and shrimp from Honduras. Persons on fishing vessels owned by **MCNAB** and/or his companies would keep undersized spiny lobster tails with no regard to the regulations. They also would keep egg-bearing lobster and, by trying to remove the eggs from the underside of the tail, attempt to conceal that they were killing such pregnant lobster. Furthermore, lobster and shrimp were commercially poached, possessed and/or sold by the conspirators during the closed season.

11. Because their lobster catch included undersized and egg-bearing lobster, it was not taken to a Honduran processing plant for health and sanitation inspection, sorting and boxing. Often the catch was not even reported as required under Honduran law. Rather, it was directly exported in bulk bags to conceal its illegal nature. Once the bulk bags arrived at a United States port, the conspirators submitted the lobster for food safety and/or quality inspections; it was not inspected by the appropriate law enforcement agency for undersized, egg-bearing, or closed-season lobster. The conspirators would then have the lobster processed in the United States and resold for a substantial profit.

12. After a load of bulk lobster was seized by federal authorities in Bayou La Batre, Alabama, **BLANDFORD** and **SCHOENWETTER** further conspired with **MCNAB** and others to attempt to transport the illegal lobster in a different manner in an effort to evade law enforcement. As part of the scheme, they began taking undersized lobster to a Honduran

processing plant owned in part by **SCHOENWETTER**. **BLANDFORD** then purchased the boxes of undersized lobster tails and would deliver them to a third party by transporting them from Honduras to Panama, and then by air freight from Panama to Canada. The conspirators developed a secret code with which to communicate in order to conceal the undersized nature of the lobster.

COUNT ONE

The allegations contained in Paragraphs 1 through 12 above are hereby realleged and incorporated by reference herein.

13. On or about at least August 4, 1995, until on or about May 10, 2000, in the Southern District of Alabama and elsewhere, the defendants

DAVID HENSON MCNAB,
ROBERT D. BLANDFORD,
ABNER J. SCHOENWETTER and
DIANE H. HUANG

did knowingly, willfully, and unlawfully combine, conspire, confederate, and agree together with each other and with others both known and unknown to the grand jury, to commit acts in violation of the laws of the United States, namely:

(a) to knowingly import and bring into the United States merchandise, that is spiny lobster tails and shrimp, contrary to law, and receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale of such merchandise after importation, knowing the same to have been imported and brought into the United States contrary to law, that is, contrary to The Lacey Act, 16 U.S.C. § 3372(a)(2)(A), by importing from Honduras to the United States lobster tails and shrimp that were taken, possessed, transported and sold in violation of and in a manner unlawful under the laws and regulations of Honduras, in violation of Title 18, United States Code, Sections 545 and 2;

(b) to knowingly engage in conduct involving the sale and purchase of fish or wildlife having a market value exceeding $350, that is spiny lobster tails and shrimp, by importing, exporting, transporting, selling, receiving, acquiring, and purchasing said fish or wildlife in interstate or foreign commerce, knowing said fish or wildlife had been taken, possessed, transported, and sold in violation of foreign law and in violation of State law, in violation of The Lacey Act, Title 16, United States Code, Sections 3372(a)(2)(A) and 3373(d)(1)(B);

(c) to knowingly import and export fish or wildlife, that is spiny lobster tails and shrimp, knowing that said fish or wildlife was taken, possessed, transported, and sold in violation of foreign law and State law or regulation, in violation of The Lacey Act, Title 16, United States Code, Sections 3372(a)(2)(A), and 3373(d)(1)(A);

(d) to knowingly conduct or attempt to conduct financial transactions, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, and which in fact involved the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity, that is, an offense under Title 18, United States Code, Section 545, in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

Manner and Means of the Conspiracy

14. It was part of this conspiracy that **MCNAB**, through CDC, owned approximately thirty-two vessels licensed by Honduras to fish for spiny lobster and/or shrimp:

15. It was a further part of this conspiracy that persons on these vessels would catch and keep spiny lobsters with tails less than five and one half (5 1/2) inches in length ("undersized" or "short" lobster tails), would catch and keep egg-bearing spiny lobsters and would catch and keep spiny lobster and shrimp during the closed seasons.

16. It was a further part of this conspiracy that persons on these vessels would try to conceal the catch of egg-bearing spiny lobsters by cutting off or clipping the swimerettes and/or pleopods to which the eggs were attached ("clipped tails"), or otherwise attempting to remove the eggs.

17. It was a further part of this conspiracy that Seamerica, by and through its President, **BLANDFORD**, acting in consultation with Seamerica's advisor, **SCHOENWETTER**, and/or with HUANG or others, would agree to purchase the spiny lobster tails and shrimp, sometimes during closed season, including the undersized, egg-bearing and clipped lobster tails, from **MCNAB's** company, CDC.

18. It was a further part of this conspiracy that **MCNAB** would attempt to conceal the undersized, egg-bearing and/or clipped spiny lobsters tails by having the lobster tails transported out of Honduras packed in bulk in large plastic bags ("bulk bags") without reporting, health and sanitation inspection, or processing of the lobster tails into boxes as required under Honduran law.

19. It was a further part of this conspiracy that, whenever possible, the conspirators would have the bulk bags of spiny lobster tails and shrimp transported on a particular vessel, called the Caribbean Clipper, from Honduras to Bayou La Batre, Alabama, where **BLANDFORD** dba Seamerica would import the lobster tails.

20. It was a further part of this conspiracy that **BLANDFORD** and/or **SCHOENWETTER**, through Seamerica, would either get these bulk bags of spiny lobster tails processed into approximately forty pound boxes and then sell them, or sell the unprocessed tails in bulk to Ex-Im through **HUANG**, and to a Seattle-based seafood company ("Seattle co-conspirator"), among others.

21. It was a further part of this conspiracy that **BLANDFORD** would cause Seamerica to pay **MCNAB's** company

for the shipments of bulk Honduran spiny lobster tails after Seamerica had sold the tails, using all or part of the proceeds Seamerica received from the sale.

22. It was a further part of this conspiracy that **BLANDFORD** would cause Seamerica to pay commission or agent's fees for some of these shipments of bulk spiny lobster tails to himself, either directly or through his company Primestar, to **SCHOENWETTER**, either directly or through his company Triangle Transport, and to **HUANG** through her company Besta Corporation.

23. It was a further part of this conspiracy that after February 1999, **SCHOENWETTER**, through Mariscos Islenos, the Honduran processing company of which he was part owner, made arrangements to obtain undersized lobster tails from, among others, **MCNAB**. After Mariscos Islenos processed these lobster tails, **BLANDFORD**, through Seamerica, would purchase them.

24. It was a further part of this conspiracy that **BLANDFORD** dba Seamerica sold these boxes of undersized lobster tails to the Seattle co-conspirator, and arranged to transport the lobster tails from Honduras to Panama and then by air freight from Panama to the Seattle coconspirator's facility in Canada.

25. It was a further part of this conspiracy that paperwork associated with these sales of processed lobster tails would be written in a code intended to conceal the undersized nature of the lobster tails.

26. It was a further part of this conspiracy that **MCNAB**, **BLANDFORD**, **SCHOENWETTER**, and **HUANG**, and others both known and unknown to the grand jury, concealed the existence of the conspiracy and took steps designed to prevent the disclosure of their activities in a continuing effort to avoid detection and prosecution for their illegal conduct.

Overt Acts

In furtherance of the conspiracy and to effect the objects of the conspiracy, the following overt acts, among others, were committed in the Southern District of Alabama and elsewhere:

27. Each voyage made by the Caribbean Clipper from Honduras to Bayou La Batre, Alabama, has an associated number assigned to it by one of **MCNAB's** companies. For example, the voyage on which the Caribbean Clipper arrived in Bayou La Batre, Alabama, from Honduras on or about September 3, 1996, was Voyage 46.

Voyage 46

28. On or about August 30, 1996, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 57,641 pounds (about 900 bulk bags) of frozen spiny lobster tails, all of which was "product of Honduras," for a total price of approximately $481,302.35.

29. On or about September 3, 1996, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 57,641 pounds (about 900 bulk bags) of Honduran spiny lobster tails transported on the Caribbean Clipper's Voyage 46. The spiny lobster tails in this shipment were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included undersized lobster tails.

30. On or about September 5, 1996, **HUANG** for Ex-Im agreed to purchase from Seamerica approximately 17,243 pounds of the "Honduras lobster tails in bulk," imported from Voyage 46. Also on or about September 5, 1996, **BLANDFORD** dba Seamerica sold the rest of the lobster tails from Voyage 46, in bulk, to two other U.S. seafood companies.

31. Between approximately September 12 and September 22, 1996, **BLANDFORD** caused Seamerica, using in whole or in part money paid by Ex-Im and the other two purchasers of the lobster from Voyage 46, to pay **MCNAB**/CDC for the spiny lobster tails from Voyage 46 by having three wire transfers and a check sent from Seamerica's account at Bank Atlantic in Florida CDC's account at AmSouth Bank in Mobile, Alabama. **BLANDFORD** had the first wire transfer sent on or about September 12, 1996, in the amount of $200,000, and the second and third wire transfers sent on or about September 18 and 19, 1996, respectively, each in the amount of $100,000. **BLANDFORD** had the final payment made by check dated September 22, 1996, in the amount of $85,428.80.

32. On or about September 13, 1996, **BLANDFORD** caused Seamerica to pay to **HUANG**, through her company, Besta Corporation, approximately $3,785.90 in commissions related to Voyage 46.

33. Between approximately September 13 and October 2, 1996, **BLANDFORD** caused Seamerica to pay to **SCHOENWETTER** either personally or through his company, Triangle Transport, approximately $37,000 in commissions related to Voyage 46.

34. Also between approximately September 13 and October 2, 1996, **BLANDFORD** caused Seamerica to pay to **BLANDFORD** personally approximately $37,000 in commissions related to Voyage 46.

Voyage 55

35. On or about April 8, 1997, during Honduras' closed season for spiny lobsters, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 35,769 pounds (about 510 bulk bags) of frozen spiny lobster tails, all of which was "product of Honduras," for a total price of approximately $482,881.50.

36. On or about April 12, 1997, during the Honduran closed season, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 35,505 pounds (about 506 bulk bags) of Honduran spiny lobster tails transported on the Caribbean Clipper's Voyage 55. The spiny lobster tails in this shipment were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included approximately 16,313 undersized lobster tails.

37. On or about April 12, 1997, **HUANG** for Ex-Im agreed to purchase from Seamerica the "Honduras lobster tails in bulk," imported from Voyage 55.

38. Between approximately April 16 and April 29, 1997, **BLANDFORD** caused Seamerica, using in whole or in part money paid by Ex-Im for the lobster from Voyage 55, to pay **MCNAB**/CDC for the spiny lobster tails from Voyage 55 by having two wire transfers sent from Seamerica's account at Bank Atlantic in Florida to CDC's account at Suntrust Bank in Florida. **BLANDFORD** caused the first wire transfer to be sent on or about April 16, 1997, in the amount of $250,000, and the second wire transfer to be sent on or about April 29, 1997, in the amount of $225,941.75.

39. On or about May 2, 1997, **HUANG**, for Ex-Im, sold and had sent to the Seattle co-conspirator approximately 22,160 pounds of spiny lobster tails from Voyage 55, including more than 2,400 pounds of undersized lobster tails.

Voyage 59

40. On or about August 21, 1997, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 39,510 pounds (about 594 bulk bags) of spiny lobster tails, all of which were "product of Honduras," for a total price of approximately $503,752.50.

41. On or about August 26, 1997, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre,

Alabama, approximately 38,951.6 pounds (about 594 bulk bags) of frozen spiny lobster tails transported on the Caribbean Clipper's Voyage 59. The spiny lobster tails in this shipment were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included approximately 6,322 undersized lobster tails.

42. On or about August 27, 1997, **BLANDFORD** dba Seamerica sold to Ex-Im, through **HUANG**, approximately 12,333 pounds of the bulk spiny lobster tails from Voyage 59, including undersized lobster tails, for approximately $154,162.50.

43. Using money received from Ex-Im and other companies for the product from Voyage 59, **BLANDFORD** caused Seamerica to pay **MCNAB**/CDC for the lobster tails and other products Seamerica purchased from Voyage 59 by means of four wire transfers from Seamerica's account at Bank Atlantic in Florida, to CDC's account at AmSouth Bank in Alabama, or at Sunbank in Florida, as follows:

Approximate Date	Approximate Amount	Receiving Bank
August 29, 1997	$125,000.00	AmSouth Bank, Alabama
September 4, 1997	$100,000.00	AmSouth Bank, Alabama
September 9, 1997	$150,000.00	Suntrust Bank, Florida
September 15, 1997	$128,277.12	Suntrust Bank, Florida

44. On or about September 10, 1997, **BLANDFORD** caused Seamerica to pay to **HUANG**, through her company, Besta Corporation, approximately $1,233.30 as a commission related to Voyage 59.

Voyage 60

45. On or about September 24, 1997, **MCNAB**, through, CDC, agreed to sell to Seamerica approximately 79,722 pounds (1,202 bulk bags) of frozen spiny lobster tails, all of which were "product of Honduras," for a total price of approximately $908,830.80.

46. On or about September 27, 1997, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 77,897.6 pounds (about 1,204 bulk bags) of spiny lobster tails, among other things, transported on the Caribbean Clipper's Voyage 60. The lobster tails in this shipment were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included approximately 18,639 undersized lobster tails.

47. On or about September 29, 1997, Ex-Im, through **HUANG**, agreed to purchase from Seamerica, through **BLANDFORD**, approximately 47,506 pounds of "Honduras lobster tails in bulk," from Voyage 60 for a total of about $581,948.50.

48. Using money received from Ex-Im and other companies for the product from Voyage 60, **BLANDFORD** caused Seamerica to pay **MCNAB**/CDC for the spiny lobster tails Seamerica purchased from Voyage 60 by means of wire transfers from its account at Bank Atlantic in Florida to CDC's accounts, as follows:

Approximate Date	Approximate Amount	Receiving Bank
October 1, 1997	$245,000.00	Suntrust Bank, Florida
October 3, 1997	$150,000.00	Suntrust Bank, Florida

October 8, 1997	$250,000.00	Suntrust Bank, Florida
October 22, 1997	$175,000.00	Suntrust Bank, Florida
October 29, 1997	$45,000.00	AmSouth Bank, Florida

49. On or about October 17, 1997, **BLANDFORD** caused Seamerica to issue a check to **HUANG's** company, Besta Corporation, for $4,750.60 in payment for agent's fees related to Voyage 60.

50. Between approximately September 29, 1997, and October 21, 1997, **HUANG** had the lobster tails Ex-Im purchased from Voyage 60 processed for Ex-Im.

51. On or about October 30, 1997, after receiving the processing results, **HUANG** notified **BLANDFORD** via telefax of the specific sizes of the lobster tails from Voyage 60, which expressly included numerous undersized lobster tails.

52. On or about October 31, 1997, **HUANG**, for Ex-Im, sold back to **BLANDFORD**, through his company Primestar, approximately 3,600 pounds of spiny lobster tails from Voyage 60, including approximately 1,200 pounds of undersized lobster tails. **BLANDFORD** had already arranged for Primestar to resell those lobster tails to a New Jersey-based seafood company.

53. On or about October 31, 1997, **BLANDFORD** caused Seamerica to issue a check to **SCHOENWETTER's** company, Triangle Transport, for $5,000 in payment for agent's fees related to Voyage 60.

54. On or about November 14, 1997, **BLANDFORD** caused Seamerica to issue a check to **SCHOENWETTER's**

company, Triangle Transport, for $30,000 in payment for "Agent's Fees V-60 Final."

55. On or about November 14, 1997, **BLANDFORD** caused Seamerica to issue a check to **BLANDFORD's** company, Primestar, for $35,000 in payment for agent's fees related to Voyage 60.

56. On or about November 17, 1997, **BLANDFORD** caused Seamerica to issue a second check to **HUANG's** company, Besta Corporation, for $575 in payment for agent's fees related to Voyage 60.

Voyages 67 and 70

57. On or about April 30, 1998, during the Honduran closed season for both spiny lobsters and shrimp, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 2,190 pounds (about 33 bulk bags) of frozen spiny lobster tails, and approximately 6,191 pounds (about 123 bulk bags) of frozen shrimp, all of which were "product of Honduras," for a total price of approximately $59,425.00.

58. On or about May 4, 1998, during the Honduran closed seasons, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 2,125.8 pounds (about 33 bulk bags) of spiny lobster tails and approximately 6,497.6 pounds (about 123 bulk bags) of shrimp, transported on the Caribbean Clipper's Voyage 67. These lobster tails were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included undersized lobster tails.

59. Between approximately April 30, 1998, and May 7, 1998, Ex-Im, through **HUANG**, agreed to purchase from Seamerica, through **BLANDFORD**, the "Honduras lobster tails in bulk," from Voyage 67 for a total of about $27,635.40.

60. On or about June 12, 1998, again during the Honduran closed season, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 4,429 pounds of spiny lobster tails (about 70 bulk bags), all of which were "produced in Honduras," for a total price of approximately $53,148.00.

61. On or about June 16, 1998, during the Honduran closed season, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 4,336.8 pounds (about 69 bulk bags) of spiny lobster tails, transported on the Caribbean Clipper's Voyage 70. These lobster tails were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included undersized lobster tails.

62. Between approximately June 12 and June 18, 1998, Ex-Im, through **HUANG**, agreed to purchase from Seamerica through **BLANDFORD**, the "Honduras lobster tails in bulk," from Voyage 70 for a total of about $56,378,40.

63. Using money received from Ex-Im for the lobster from Voyages 67 and 70, **BLANDFORD** caused Seamerica to pay **MCNAB**/CDC for the lobster tails Seamerica purchased from Voyages 67 and 70, by sending a wire transfer on or about July 13, 1998, for approximately $62,120.00 from Seamerica's account at Bank Atlantic in Florida to CDC's account at AmSouth Bank in Alabama.

64. On or about July 6-8, 1998, **HUANG** had the bulk lobster tails that Ex-Im had purchased from Seamerica from both Voyages 67 and 70 processed for Ex-Im, including the undersized lobster tails from both shipments. The processing confirmed that the lobster tails from Voyages 67 and 70 included approximately 14,321 undersized tails.

65. On approximately July 29, 1998, **HUANG** arranged for Ex-Im to sell approximately 6,280 pounds of the Honduran lobster tails from Voyages 67 and 70, including undersized lobster tails, back to Seamerica, through **BLAND-**

FORD, for approximately $75,025.20. **BLANDFORD** dba Seamerica resold those lobster tails that same day, for the same price, to the Seattle co-conspirator.

Voyages 72 and 73

66. On or about July 18, 1998, during the closed season for spiny lobster in Honduras, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 28,263 pounds (about 417 bulk bags) of frozen spiny lobster tails, all of which were "product of Honduras," for a total price of approximately $363,179.55.

67. On or about July 22, 1998, during the Honduran closed season, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 27,881 pounds (about 417 bulk bags) of spiny lobster tails, transported on the Caribbean Clipper's Voyage 72. These lobster tails were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included undersized lobster tails.

68. Between approximately July 18 and July 24, Ex-Im, through **HUANG**, agreed to purchase from Seamerica, through **BLANDFORD**, the "Honduras lobster tails in bulk" from Voyage 72, for a total of about $376,393.50.

69. On or about July 28, 1998, **BLANDFORD** caused Seamerica, using proceeds received from Ex-Im, to pay **MCNAB**/CDC for the lobster tails Seamerica purchased from Voyage 72 by having a wire transfer sent from Seamerica's account at Bank Atlantic in Florida to CDC's account at AmSouth Bank in Alabama, in the amount of $358,270.85.

70. On or about July 26, 1998, **BLANDFORD** caused Seamerica to issue a check to **HUANG's** Besta Corporation for $2,788.10. On or about July 28, 1998, **BLANDFORD** caused Seamerica to issue a check to **SCHOENWETTER's** Triangle Transport company for $5,000 and a check to

BLANDFORD's Primestar company for $5,000. All three check payments were for agent's fees related to Voyage 72.

71. On or about August 9, 1998, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 24,697 pounds (about 360 bulk bags) of frozen spiny lobster tails, all of which were "produced in Honduras," for a total price of approximately $302,538.25.

72. On or about August 12, 1998, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 24,315.6 (about 360 bulk bags) of spiny lobster tails, transported on the Caribbean Clipper's Voyage 73. These lobster tails were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included undersized lobster tails.

73. Between approximately August 9 and August 13, 1998, Ex-Im, through **HUANG**, agreed to purchase from Seamerica, through **BLANDFORD**, approximately 12,897 pounds (about 192 bags) of "Honduras lobster tails," for a total of about $166,371.30.

74. On or about August 18, 1998, **BLANDFORD** caused Seamerica, using in whole or in part proceeds received from the sale of bulk lobster to Ex-Im, to pay **MCNAB**/CDC for the spiny lobster tails Seamerica purchased from Voyage 73 by having two wire transfers sent from Seamerica's account at Bank Atlantic in Florida to CDC's account at AmSouth Bank in Alabama. The first wire transfer was sent on or about August 18, 1998, in the amount of $150,000. The second wire transfer was sent on or about September 8, 1998, in the amount of $41,787.20.

75. On or about August 16-25, 1998, Ex-Im, through **HUANG**, had the bulk spiny lobster tails that it had purchased from Seamerica from both Voyages 72 and 73, including the undersized lobster tails, transported into the State

of Florida and processed. **HUANG** then arranged, after receiving, on or about August 25, 1998, the detailed size information for these lobster tails (reflecting approximately 25,944 undersized tails), for Ex-Im to have the lobster tails, including the undersized tails, transported back out of Florida to a warehouse in New Jersey.

76, On or about August 18-20, 1998, **BLANDFORD** had Seamerica's remaining bulk spiny lobster tails from Voyage 73, *i.e.*, those that had not already been sold to Ex-Im, processed. The results of that processing, including the amounts of undersized lobster tails (approximately 5,186 undersized tails), were provided on or about August 20, 1998, to both **BLANDFORD** and **SCHOENWETTER**.

77. Between approximately August 18 and September 2, 1998, the Seattle co-conspirator agreed to purchase from Seamerica approximately 12,240 pounds of lobster tails from Voyage 73, including undersized lobster tails, for approximately $146,518.

78. On or about September 7, 1998, **BLANDFORD** caused Seamerica to issue a check to **SCHOENWETTER's** Triangle Transport company, and a check to **BLANDFORD's** Primestar company, each in payment for agent's fees of $35,000, related to Voyage 73.

79. On or about September 21, 1998, **BLANDFORD** caused Seamerica to issue a check to **HUANG's** Besta Corporation for $1,289.70 in payment for agent's fees related to Voyage 73.

Voyage 78

80. On or about November 10, 1998, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 4,980 pounds (about 71 bulk bags) of frozen lobster tails, all of which was "produced in Honduras," for a total price of approximately $54,780.00.

81. On or about November 14, 1998, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre, Alabama, approximately 4,764 pounds (about 71 bulk bags) of Honduran spiny lobster tails, transported on the Caribbean Clipper's Voyage 78. These lobster tails were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included approximately 1,253 undersized lobster tails.

82. On or about November 16, 1998, Ex-Im, through **HUANG**, agreed to purchase from Seamerica, through **BLANDFORD**, the "Honduras lobster tails in bulk . . . (71 bags)" from Voyage 78. The same day, these bulk Honduran lobster tails, including the undersized lobster tails, were transported for **HUANG**, acting for Ex-Im, to a company in Miami, Florida, where the lobster was sorted by size and otherwise processed.

83. On or about November 19, 1998, using money received from Ex-Im, **BLANDFORD** caused Seamerica to pay **MCNAB**/CDC for the Honduran spiny lobster tails from Voyage 78 by having $52,404 sent by wire transfer from Seamerica's account at Bank Atlantic in Florida to CDC's account at AmSouth Bank in Alabama.

84. On or about December 10, 1998, **HUANG** arranged for Ex-Im to sell back to **BLANDFORD** dba Seamerica some of the undersized lobster tails from Voyage 78 that had been processed in Miami, Florida.

Voyage 79

85. On or about December 3, 1998, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 39,021 pounds (about 562 bulk bags) of frozen spiny lobster tails, all of which was "produced in Honduras," for a total price of approximately $438,986.25.

86. On or about December 7, 1998, **BLANDFORD** dba Seamerica imported from Honduras through Bayou La Batre,

Alabama, approximately 39,173.2 pounds (about 562 bulk bags) of spiny lobster tails, transported on the Caribbean Clipper's Voyage 79. These lobster tails were not processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States and included at least approximately 3,527 undersized lobster tails.

87. On or about December 8, 1998, a seafood company located in Florida agreed to purchase from Seamerica, through **BLANDFORD**, approximately 27,882.80 pounds of the "Honduras lobster tails in bulk . . . (396 bags)," from Voyage 79 for approximately $326,917.90.

88. On or about December 8, 1998, Ex-Im, through **HUANG**, agreed to purchase from Seamerica, through **BLANDFORD**, approximately 11,350.4 pounds of the "Honduras lobster tails in bulk . . . (166 bags)," from Voyage 79, which included undersized lobster tails, for approximately $132,232.16. On approximately the same day, these lobster tails, including the undersized lobster tails, were transported for **HUANG**, acting for Ex-Im, to Miami, Florida, where the lobster was sorted by size and otherwise processed.

89. On or about December 11, 1998, using the money sent to it by Ex-Im and the second Florida seafood company, **BLANDFORD** caused Seamerica to pay **MCNAB**/CDC for the Honduran spiny lobster tails from Voyage 79 by having $440,698.50 sent by wire transfer from Seamerica's account at Bank Atlantic in Florida to CDC's account at AmSouth Bank in Alabama.

90. On or about December 10, 1998, **BLANDFORD** caused Seamerica to issue a check to **SCHOENWETTER's** company, Triangle Transport, and a second check to **BLANDFORD's** Primestar company, each in payment for agent's fees in the amount of $6,000, related to Voyage 79.

91. On or about December 17, 1998, **BLANDFORD** caused Seamerica to issue a check to **HUANG's** Besta Corporation for $1,135.04 in payment for agent's fees related to Voyage 79.

92. On or about December 17, 1998, **HUANG** arranged for Ex-Im to sell and ship to a company in Canada more than $350 worth of the undersized lobster tails Ex-Im had purchased from Voyage 79 and processed in Florida.

Voyage 81

93. On or about February 1, 1999, **MCNAB**, through CDC, agreed to sell to Seamerica approximately 70,787.80 pounds (about 1,000 bulk bags) of frozen lobster tails, all of which was "product of Honduras," for a total price of approximately $820,800.

94. On or about February 4, 1999, **BLANDFORD** and **SCHOENWETTER** dba Seamerica attempted to import from Honduras approximately 70,787.80 pounds (about 999 bulk bags) of spiny lobster tails transported to Bayou La Batre, Alabama on the Caribbean Clipper's Voyage 81. These lobster tails had not been processed/packed in a government-approved establishment or plant in Honduras prior to export to the United States. Included in this shipment were approximately 11,666 undersized lobster tails and approximately 5,220 pounds of egg-bearing lobster tails.

CDA-1

95. On or about February 26, 1999, **BLANDFORD** and **SCHOENWETTER** dba Seamerica expressly re-confirmed in correspondence the ongoing conspiracy with **MCNAB**.

96. On or about August 6-12,1999, Seamerica, through **BLANDFORD** and **SCHOENWETTER**, agreed to sell to the Seattle co-conspirator undersized spiny lobster tails for delivery to the Seattle co-conspirator's facility in Canada. These lobster tails were processed by **SCHOENWETTER's**

government-approved processing plant, the Mariscos Islenos company, in Honduras.

97. On or about August 13, 1999, Mariscos Islenos, on behalf of Seamerica, transported the boxes of primarily undersized lobster tails sold to the Seattle co-conspirator first to Panama, and then by air freight from Panama to Canada. Each such shipment was given a reference number in Seamerica records beginning with "CDA;" this shipment was identified as "CDA-1."

CDA-3

98. On or about October 25, 1999, Seamerica sold to the Seattle co-conspirator some 6,960 pounds of undersized lobster tails. These lobster tails were processed by **SCHOENWETTER's** government-approved processing plant, the Mariscos Islenos company, in Honduras and transported first to Panama and then by air freight to the Seattle co-conspirator's facility in Canada.

99. On or about November 3, 1999, the Seattle co-conspirator paid for these undersized lobster tails by sending a wire transfer from its account in Washington to Seamerica's Bank Atlantic account in Florida in the amount of $162,126.28. Of this amount, $81,209.28 was payment for this load.

100. On or about November 4, 1999, **BLANDFORD** caused Seamerica to pay **SCHOENWETTER** for these lobster tails from Mariscos Islenos by paying **SCHOENWETTER**, through Horizon Seafood, approximately $70,644.00.

101. **BLANDFORD** dba Seamerica, **SCHOENWETTER** dba Horizon Seafood, and **HUANG** failed to apply for or obtain the saltwater products dealers license required under Title 28, Florida Statutes, Part 370, to conduct those dealings in lobster from and in the State of Florida described in paragraphs 27-100 above, which failure helped conceal these activities.

All in violation of Title 18, United States Code, Section 371.

COUNTS TWO THROUGH SIX

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about the dates set forth below, in the Southern District of Alabama and elsewhere, the defendants

DAVID HENSON MCNAB and
ROBERT D. BLANDFORD

knowingly brought into the United States certain merchandise, as set forth below

Count	Voyage	Date	Merchandise
2	55	April 12, 1997	approximately 35,505 pounds of Caribbean spiny lobster tails
3	59	August 26, 1997	approximately 38,951.6 pounds of Caribbean spiny lobster tails
4	67	May 4, 1998	approximately 2,125.8 pounds of Caribbean spiny lobster tails and approximately 6,497.6 pounds of shrimp
5	70	June 16, 1998	approximately 4,336.8 pounds of Caribbean spiny lobster tails
6	78	November 14, 1998	approximately 4,764 pounds of Caribbean spiny lobster tails

contrary to law, that is contrary to Title 16, United States Code, Section 3372(a)(2)(A), by importing from Honduras to the United States fish or wildlife that was taken, possessed, transported and sold in violation of and in a manner unlawful under the laws and regulations of Honduras, specifically Resolution No. 030-95 (December 5, 1995) (size restrictions); Resolution No. 0008-93 (January 13, 1993) (inspection and processing/packing requirements); Decree N. 154, (May 19, 1959), Chapter IV, Fishermen Rights and Duties, Articles 35 and 37 (reporting requirements); and, as to Counts 4, and 5, Decree N. 154, (May 19, 1959), Chapter V, Closed Seasons, Articles 41, 43 and 54, and Resolution No. 031-97 (December 17, 1997) (closed season restrictions for lobster and shrimp for 1998, specifically).

All in violation of Title 18, United States Code, Sections 545 and 2.

COUNTS SEVEN THROUGH TWELVE

The allegations contained in paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about the dates set forth below, in the Southern District of Alabama and elsewhere, the defendants

DAVID HENSON MCNAB,
ROBERT D. BLANDFORD and
ABNER J. SCHOENWETTER

knowingly brought into the United States certain merchandise, as set forth below:

Count	Voyage	Date	Merchandise
7	46	September 3, 1996	approximately 57,641 pounds of Caribbean spiny lobster tails

8	60	September 27, 1997	approximately 77,897.6 pounds of Caribbean spiny lobster tails
9	72	July 22, 1998	approximately 27,881 pounds of Caribbean spiny lobster tails
10	73	August 12, 1998	approximately 24,315.6 pounds of Caribbean spiny lobster tails
11	79	December 7, 1998	approximately 39,173.2 pounds of Caribbean spiny lobster tails
12	81	February 4, 1999	approximately 70,787.8 pounds of Caribbean spiny lobster tails

contrary to law, that is contrary to Title 16, United States Code, Section 3372(a)(2)(A), by importing from Honduras to the United States fish or wildlife that was taken, possessed, transported and sold in violation of and in a manner unlawful under the laws and regulations of Honduras, specifically Resolution No. 030-95 (December 5, 1995) (size restrictions); Resolution No. 0008-93 (January 13, 1993) (inspection and processing/packing requirements) Articles 3 ,and 49; Decree N. 154, (May 19, 1959), Chapter IV, Fishermen Rights and Duties, Articles 35 and 37 (reporting requirements); and, as to Count 9, Decree N. 154, (May 19, 1959), Chapter V, Closed Seasons, Articles 41, 43 and 54, and Resolution No. 031-97 (December 17, 1997) (closed season restrictions for lobster 1998, specifically).

All in violation of Title 18, United States Code, Sections 545 and 2.

COUNTS THIRTEEN THROUGH TWENTY-TWO

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about the dates set forth below, in the Southern District of Alabama and elsewhere, the defendants

DIANE H. HUANG and
ROBERT D. BLANDFORD

did knowingly engage in conduct that involved the sale and purchase of, offer of sale and purchase of, and intent to sell and purchase fish or wildlife with a market value in excess of $350.00, and did knowingly transport, sell, receive, acquire and purchase said fish or wildlife in interstate and foreign commerce, as follows:

Count	Voyage	Date	Wildlife
13	46	September 5, 1996	approximately 17,243 pounds of Caribbean spiny lobster tails
14	55	April 12, 1997	approximately 35,505 pounds of Caribbean spiny lobster tails
15	59	August 27, 1997	approximately 12,333 pounds of Caribbean spiny lobster tails
16	60	September 29, 1997	approximately 47,506 pounds of Caribbean spiny lobster tails
17	67	May 7, 1998	approximately 2,125.8 pounds of Caribbean spiny lobster tails

18	70	June 18, 1998	approximately 4,336.8 pounds of Caribbean spiny lobster tails
19	72	July 24, 1998	approximately 27,881 pounds of Caribbean spiny lobster tails
20	73	August 13, 1998	approximately 12,897 pounds of Caribbean spiny lobster tails
21	78	November 16, 1998	approximately 4,764 pounds of Caribbean spiny lobster tails
22	79	December 8, 1998	approximately 11,350.4 pounds of Caribbean spiny lobster tails

knowing that said fish or wildlife was taken, possessed, transported and sold in violation of and in a manner unlawful under the laws and regulations of Honduras, specifically, Resolution No. 030-95 (December 5, 1995) (size restrictions); Resolution No. 0008-93 (January 13, 1993) (inspection and processing/packing requirements); Decree N. 154, (May 19, 1959), Chapter IV, Fishermen Rights and Duties, Articles 35 and 37 (reporting requirements); and, as to Counts 17, 18, and 19, Decree N. 154, (May 19, 1959), Chapter V, Closed Seasons, Articles 41, 43 and 54, and Resolution No. 031-97 (December 17, 1997) (closed season restrictions for lobster and shrimp for 1998).

All in violation of Title 16, United States Code, Sections 3372(a)(2)(A), 3373(d)(1)(B), and Title 18, United States Code, Section 2.

COUNTS TWENTY-THREE THROUGH TWENTY-FIVE

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about the dates set forth below, in the Southern District of Alabama and elsewhere, the defendant

DIANE H. HUANG

did knowingly engage in conduct that involved the sale and purchase of, offer of sale and purchase of, and intent to sell and purchase fish of wildlife with a market value in excess of $350.00, and did knowingly transport, sell, receive, acquire and purchase said fish or wildlife in interstate and foreign commerce, as follows:

Count	Voyage	Date	Wildlife
23	72, 73	August 16-25, 1998	approximately 25,944 undersized Caribbean spiny lobster tails
24	78	November 16, 1998	approximately 1,253 undersized Caribbean spiny lobster tails
25	79	December 8, 1998	approximately 3,527 undersized Caribbean spiny lobster tails

knowing that said fish or wildlife was taken, possessed, transported and sold in violation of and in a manner unlawful under the laws and regulations of Honduras, specifically, Resolution No. 030-95 (December 5, 1995) (size restrictions); Resolution No. 0008-93 (January 13, 1993) (inspection and processing/packing requirements); Decree N. 154, (May 19, 1959), Chapter IV, Fishermen Rights and Duties, Articles 35 and 37 (reporting requirements); and in a manner

unlawful under the laws and regulations of the State of Florida, specifically Title 68B, Fla. Admn. Code, Chapter 68B-24.003.

All in violation of Title 16, United States Code, Sections 3372(a)(2)(A), 3373(d)(1)(B).

COUNTS TWENTY-SIX THROUGH TWENTY-SEVEN

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about the dates set forth below, in the Southern District of Alabama and elsewhere, the defendants

DIANE H. HUANG and
ROBERT D. BLANDFORD

did knowingly engage in conduct that involved the sale and purchase of, offer of sale and purchase of, and intent to sell and purchase fish or wildlife with a market value in excess of $350.00, and did knowingly transport, sell, receive, acquire and purchase said fish or wildlife in interstate commerce, as follows:

Count	Voyage	Date	Wildlife
26	60	October 31, 1997	more than 1,200 pounds of undersized Caribbean spiny lobster tails
27	67, 70	July 29, 1998	more than 1,600 pounds of undersized Caribbean spiny lobster tails

knowing that said fish or wildlife was taken, possessed, transported and sold in violation of and in a manner unlawful under the laws and regulations of Honduras, specifically, Resolution No. 030-95 (December 5, 1995) (size restric-

tions); Resolution No. 0008-93 (January 13, 1993) (inspection and processing/packing requirements); Decree N. 154, (May 19, 1959), Chapter IV, Fishermen Rights and Duties, Articles 35 and 37 (reporting requirements); and, as to Count 27, Decree N. 154, (May 19, 1959), Chapter V, Closed Seasons, Articles 41, 43 and 54, and Resolution No. 031-97 (December 17, 1997) (closed season restrictions for lobster for 1998).

All in violation of Title 16, United States Code, Sections 3372(a)(2)(A), 3373(d)(1)(B), and Title 18, United States Code, Section 2.

COUNTS TWENTY-EIGHT TO THIRTY-NINE

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about the dates set forth below, in the Southern District of Alabama and elsewhere, the defendants

DAVID HENSON MCNAB and
ROBERT D. BLANDFORD

did knowingly engage and attempt to engage in and did aid, abet, counsel, command, induce and procure and cause the engaging and attempt to engage in the following monetary transactions by through or to a financial institution, affecting interstate or foreign commerce, in criminally derived property of a value greater than $10,000, that is transfers of funds, in the amounts and into the accounts listed below, such property having been derived from a specified unlawful activity, that is, Title 18 U.S.C. Section 545.

Count	Date of Transfer	To	Amount
28	September 12, 1996	AmSouth Bank, Alabama, Acct. #88875679	$200,000.00

29	September 18, 1996	AmSouth Bank, Alabama, Acct. #88875679	$100,000.00
30	September 19, 1996	AmSouth Bank, Alabama, Acct. #88875679	$100,000.00
31	August 29, 1997	AmSouth Bank, Alabama, Acct. #88875679	$125,000.00
32	September 4, 1997	AmSouth Bank, Alabama, Acct. #88875679	$100,000.00
33	October 29, 1997	AmSouth Bank, Alabama, Acct. #88875679	$45,000.00
34	July 13, 1998	AmSouth Bank, Alabama, Acct. #88875679	$62,120.00
35	July 28, 1998	AmSouth Bank, Alabama, Acct. #88875679	$358,270.85
36	August 18, 1998	AmSouth Bank, Alabama, Acct. #88875679	$150,000.00
37	September 8, 1998	AmSouth Bank, Alabama, Acct. #88875679	$41,787.20
38	November 19, 1998	AmSouth Bank, Alabama, Acct. #88875679	$52,404.00

39	December 11, 1998	AmSouth Bank, Alabama, Acct. #88875679	$440,698.50

All in violation of Title 18, United States Code, Sections 1957 and 2.

COUNTS FORTY THROUGH FORTY-TWO

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

102. On or about September 27, 1996, **MCNAB** agreed to purchase for approximately $225,000, plus the trade in of two other boats, a new forty-three foot Viking yacht. On that same day, **MCNAB** paid a deposit by check from CDC's AmSouth Bank account for the yacht of $100,000. On or about October 22, 1996, **MCNAB** paid the remainder due on the yacht, plus an additional $14,000 for equipment for and work on the yacht, for a total of approximately $139,000, using a check from CDC's AmSouth Bank account. Both the deposit and the final payment consisted in whole or in part of proceeds from the sale of lobster tails from Voyage 46.

103. On or about December 5, 1998, using money from CDC's account at AmSouth in Alabama, **MCNAB** paid by check more than $74,000.00 for a Mercedes Benz automobile. The money for this financial transaction consisted in whole or in part of proceeds from the sale of lobster tails from Voyage 78.

On or about the dates set forth below, in the Southern District of Alabama and elsewhere, the defendant

DAVID HENSON MCNAB

did knowingly engage and attempt to engage in and did aid, abet, counsel, command, induce and procure and cause the engaging and attempts to engage in the following monetary

transactions by through or to a financial institution, affecting interstate or foreign commerce, in criminally derived property of a value greater than $10,000, that the payment by check, in the amounts listed below, such property having been derived from a specified unlawful activity, that is, Title 18 U.S.C. Section 545.

Count	Date	Amount	Monetary Transaction
40	September 27, 1996	$100,000.00	AmSouth Bank, Alabama, Acct. #88875679
41	October 2, 1996	$139,000.00	AmSouth Bank, Alabama, Acct. #88875679
42	December 5, 1998	$74,000.00	AmSouth Bank, Alabama, Acct. #88875679

All in violation of Title 18, United States Code, Sections 1957 and 2.

COUNT FORTY-THREE

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

Beginning on or about at least August 14, 1995, and continuing through on or about May 10, 2000, within the Southern District of Alabama, and elsewhere, the defendants

DAVID HENSON MCNAB and
ROBERT D. BLANDFORD

did conspire and agree with one another and with others both known and unknown to the grand jury, to knowingly engage or attempt to engage in monetary transactions in criminally

derived property that were of a value greater than $10,000, in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 1956(h).

COUNT FORTY-FOUR

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about October 27, 1999, in the Southern District of Alabama, the defendant,

ABNER J. SCHOENWETTER

did corruptly obstruct and impede or endeavor to obstruct and impede the due administration of justice in federal grand jury 99-2, USAO number 99R00060, in the Southern District of Alabama, by intentionally withholding and failing to produce, in direct response to a subpoena duly issued by the federal grand jury on August 16, 1999, to Horizon Seafood and/or **ABNER J. SCHOENWETTER**, documents responsive to that subpoena.

All in violation of Title 18, United States Code, Section 1503(a).

COUNT FORTY-FIVE

The allegations contained its Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about October 27, 1999, in the Southern District of Alabama, the defendant,

ROBERT D. BLANDFORD

did corruptly obstruct and impede or endeavor to obstruct and impede the due administration of justice in federal grand jury 99-2, USAO number 99R00060, in the Southern District of Alabama, by intentionally withholding and failing to produce, in direct response to a subpoena duly issued by the federal grand jury on July 22, 1999, to Seamerica Corporation,

Primestar Foods, and/or **ROBERT D. BLANDFORD**, documents responsive to that subpoena.

All in violation of Title 18, United States Code, Section 1503(a).

COUNT FORTY-SIX

The allegations contained in Paragraphs 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about March 28, 2000, in the Southern District of Alabama, the defendant,

ABNER J. SCHOENWETTER,

did corruptly obstruct and impede or endeavor to obstruct and impede the due administration of justice in federal grand jury 99-2, USAO number 99R00060, in the Southern District of Alabama, by intentionally withholding and failing to produce, in direct response to a subpoena duly issued by the federal grand jury on March 9, 2000, to **ABNER J. SCHOENWETTER** as custodian of records for Horizon Seafood and/or Triangle Transport Systems, Inc., documents responsive to that subpoena.

All in violation of Title 18, United States Code, Section 1503(a).

COUNT FORTY-SEVEN

The allegations contained in Paragraph 1 through 101 above are hereby realleged and incorporated by reference herein.

On or about October 6, 1996, in the Southern District of Alabama, the defendant,

DIANE H. HUANG

did knowingly make and submit a false, record, account and label for, and a false identification of, fish and wildlife, that

is, re-labeled boxes of Caribbean spiny lobster tails imported from Honduras and processed at Sal-Serv (formerly CSI, Inc.) as a product of the United States, which fish and wildlife had been, and was intended to be, imported, exported, transported, sold, purchased and received from a foreign country and transported in interstate and foreign commerce, and which knowing act involved the sale and purchase, offer of sale and purchase and commission of an act with intent to sell and purchase fish and wildlife with a market value greater than $350.

All in violation of Title 16, United States Code, Section 3372(d), 3373(d)(3)(A)(i) and Title 18, United States Code, Section 2.

FORFEITURE

1. The allegations contained in Counts Two through Twelve and Twenty-Eight through Forty-Two (smuggling and money laundering counts) of this Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 982.

2. The defendants **DAVID HENSON MCNAB, ROBERT D. BLANDFORD**, and **ABNER J. SCHOENWETTER**, shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 982(a), any and all right, title, and interest they may have in any property constituting, and derived from, proceeds the defendants **DAVID HENSON MCNAB, ROBERT D. BLANDFORD,** and/or **ABNER J. SCHOENWETTER**, obtained directly and indirectly, as the result of their violations of Title 18, United States Code, Section 1957, alleged in Counts Twenty-Eight through Forty-Two, as well as all property and/or possessions involved in such offense, or any property traceable to such property, and Title 18, United States Code, Section 545, alleged in Counts Two through Twelve.

3. As a result of the offense alleged in Count Forty-Three, **DAVID HENSON MCNAB** and **ROBERT D. BLANDFORD** shall forfeit to the United States all property, real and personal, involved in Count Forty-Three and all property traceable to such property, as to which property the said defendants are jointly and severally liable, including, but not limited to approximately $ 7,805,149.43 in United States currency and all interest and proceeds traceable thereto, in that such sum in aggregate is property which was involved in the aforestated offense or is traceable to such property, in violation of title 18, United States Code, Sections 1956(h).

4. If any of the property described above, as a result of any act or omission of the defendants:

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third party;

c. Has been placed beyond the jurisdiction of the court;

d. Has been substantially diminished in value;

e. Has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property under the provisions of Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Sections 982(b)(1)(A) and (B).

A TRUE BILL

/s/

FOREMAN, UNITED STATES GRAND JURY
SOUTHERN DISTRICT OF ALABAMA

J. DON FOSTER
UNITED STATES ATTORNEY

by:

/s/
Marie E. Murphy
Assistant United States Attorney

/s/
Deborah A. Griffin
Assistant United States Attorney
Deputy Chief, Criminal Division

/s/
Elinor Colbourn
Special Assistant U.S. Attorney SEPTEMBER 2000

PENALTY PAGE

DEFENDANT(S):	**1) DAVID HENSON MCNAB (Cts. 1-12, 28-48, Forfeiture)** **2) ROBERT D. BLANDFORD (Cts. 1-22, 26-39, 43, 45 Forfeiture)** **3) ABNER J. SCHOENWETTER (Cts. 1, 7-12, 44, 46, Forfeiture** **4) DIANE H. HUANG (Cts. 1, 13-27, 47)**
USAO NUMBER:	**00R00060**
AUSA:	**MARIA E. MURPHY**

CODE VIOLATIONS:

COUNT 1:	**18 USC 371** **CONSPIRACY**
COUNTS 2-12	**18 USC 545** **SMUGGLING GOODS INTO UNITED STATES**
COUNTS 13-27	**16 USC 3372(a(2)(A)** **16 USC 3373(d)(1)** **IMPORTING ILLEGAL WILD-LIFE/LACEY ACT**
COUNTS 28-42	**18 USC 1957** **FRAUDULENT TRANSACTIONS OF FUNDS DERIVED FROM UNLAWFUL ACTIVITY**
COUNT 43	**18 USC 1956(h)**
COUNTS 44-46	**18 USC 1503(a)** **OBSTRUCTION OF JUSTICE**
COUNT 47	**16 USC 3372(d), 3373(d)(3)(A)(i)** **FALSE LABELING OF FISH OR WILDLIFE**

FORFEITURE	**18 USC 982(a)**
PENALTY:	
COUNT 1:	**5 YRS/$250,000/3 YRS SRT/$100 SA**
COUNTS 2-12	**5 YRS/$250,000/3 YRS SRT/$100 SA**
COUNTS 13-27	**5 YRS/$250,000/3 YRS SRT/$100 SA**
COUNTS 28-42	**10 YRS/$250,000/3 YRS SRT/$100 SA**
COUNTS 43	**10 YRS/$250,000/3 YRS SRT/$100 SA**
COUNTS 44-46	**10 YRS/$250,000/3 YRS SRT/$100 SA**
COUNT 47	**5 YRS/$250,000/3 YRS SRT/$100 SA**
FORFEITURE	

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID HENSON McNAB, ROBERT BLANDFORD, ABNER SCHOENWETTER, and DIANE HUANG, Defendants.	CRIMINAL NO. 00-0079 SEPTEMBER 27, 2000 COURTROOM 2B U.S. FEDERAL COURTHOUSE MOBILE, ALABAMA VOLUME I

MOTION HEARING

BEFORE THE HON. RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

* * * * *

[32]

MR. COURTNEY: Paragraph number four is Article 30 of The Fishing Law. It is not referenced in the indictment at all.

THE COURT: You're saying that The Fishing Law, [33] violation of Article 154, is not in the indictment?

MR. COURTNEY: Article 30, Judge.

THE COURT: Article 30.

MR. COURTNEY: It is not referenced in the indictment. Paragraph six, Article 70 of The Fishing Law, is not referenced in the indictment.

THE COURT: All right. And what you are contending the effect of that is?

MR. COURTNEY: Well, as I understand Ms. Colbourn, she has now admitted that the resolutions that are in the indictment are defective and that they plan to again supersede the indictment to bring in Article 70. And we disagree with what they say Article 70 says. What Article 70 says is that you—well, that gets—we do disagree. The point is, Judge, it's not in the indictment.

THE COURT: Well, Counsel, as I interpret the statement made by the Government was that—what they're saying is that The Fishing Law, this is a violation that is contended by the Government, and it is required that the fishermen, as set out in number four, dock their vessels, unload their catch in a Honduran port prior to exportation. That is The Fishing Law decree. Whether it's under Article 30, it appears to be that that's—they are citing a Fishing Law Decree Number 154.

I'm not up on this, but what I'm saying to you is it [34] appeared to me that there was some objection made at the last hearing we had insofar as requiring the vessels to dock for the purpose of transferring his catch and having it processed or shown. My recollection of what you stated at that time was that it was authorized because of Hurricane Mitch or whatever that this could have been done at sea aboard a vessel, and this was what the Defendant did in the case.

MR. COURTNEY: Judge, on the bringing into port point, which is Article 30, our first point is that they have not cited that in the indictment, but that is the point they raised in the civil forfeiture case. And then we got in and we took the deposition of their representative, and he ended up admitting

that the lobster had been brought to port. And I suspect that's why they haven't included it in the indictment. The first time we saw that they were re-raising it is when it pops up on this list this morning.

But if they want to try the case on that point, we'll be—you know, we can since we already have them admitting that they were in error in the civil forfeiture proceeding on that point.

THE COURT: Well, I may be wrong. I may be talking about the civil matter that we had heard before. I'm not saying—

MR. COURTNEY: So, as we sit here, we thought they had dropped that because they were just factually flat wrong in the first case. My point is that it appears they are putting it [35] back on their list today but it's not in the indictment.

THE COURT: All right. So, what—as I interpret what you are saying, Mr. Courtney, you are not objecting to them proceeding under Article 30 if they, if they provide a superseding indictment on this particular issue because it is your position that your client was not guilty of this offense?

MR. COURTNEY: Well, yes, sir. At this late date, I don't think it would be fair to this Defendant to have to defend a whole new set of claims that have been left out of the original indictment and the first superseding indictment.

THE COURT: Well, I'll hear from the Government on it. But if it, if it is the same violation, if it's a violation of the same law, whether it be Article 30 or The Fishing Law 154 or some other article, I don't see where that—and as you have stated, that doesn't prevent you from—you've prepared your defense on this issue. It doesn't make a great deal of difference whether they—whether it is charged under Article 30 or some other law, regulation, or resolution.

MR. COURTNEY: Judge, we haven't prepared our defense in this criminal proceeding on that issue because it has never been an issue in this criminal proceeding.

THE COURT: You're saying that this is a different issue? I though you just stated a moment ago that this was the same issue that was raised at some other portion—

MR. COURTNEY: It was raised in the civil forfeiture [36] proceeding last year. And that went away after the National Marine Fisheries man testified under oath, and I'll read it to you, that, "You never had any evidence that it had not been brought to port, did you? No. You just assumed it had not been brought to port? That's correct." And then I showed him affidavits from the port inspector, the fishing inspector who said, "They were brought to port. I inspected them on the land," and from the manager. And then they dropped their case on that point.

THE COURT: Well, whether your—

MR. COURTNEY: But we have not dealt with it here.

THE COURT: —client has violated the law in this area is not to be decided by the civil matter that came up. You are now contending—well, let me ask the Government.

What was charged originally, Ms. Colbourn, on this portion of it? If this is a new, if this is a new charge, tell me that it is a new charge and why this should not be stricken at this time or at least the Defendants given the opportunity to, if it's reindicted, a continuance of this matter to allow them to prepare the case if they have not been prepared on this issue before.

MS. COLBOURN: Your Honor, Article 30 is not charged in the indictment. The Defense Counsel is correct about that. Article 30 was raised in June in our original motion for pretrial determination of foreign law. We would like that—I [37] don't hear still any objection to what that law

states, and we had raised that and asked for it to be determined by the Court because we didn't want to be arguing during the trial about what that said or didn't say or what he was required as we build a factual basis for the other charges. It is a relevant issue. It simply isn't charged as a crime. But we still need that law determined because there will be testimony about how these boats operated and whether they bring them in or whether they pick them up at sea and how the industry works.

So, we have requested that. They've known since June of this year that we have requested that determination. I don't hear an objection to it as a point of law. We do not intend to add it on the superseding indictment.

THE COURT: All right. So, you're saying that there is no charge against the Defendant as to this particular article, simply that it is an article and will be used to prove other portions of the case?

MS. COLBOURN: Yes, Your Honor.

THE COURT: All right. Mr. Courtney, I see no reason if it was provided to you in June why they could not show this. This is not—they're not—they're not basing any count against the Defendants as to this particular violation of this particular article.

MR. COURTNEY: Okay. Well, Judge, if they're not claiming we violated it, then we don't have any objection to [38] the introduction of—

THE COURT: The introduction of evidence as to the fact that it was an article and applicable at the time.

MR. COURTNEY: Yes, sir. I don't think that it needs to be determined.

THE COURT: All right. Go ahead. Go on to number five.

* * * * *

[57]

MS. COLBOURN: United States calls Secretary General [58] Liliana Paz to the stand.

LILIANA PAZ,

having first been sworn, testified as follows:

* * * * *

[59]

DIRECT EXAMINATION

BY MS. COLBOURN:

Q. Ms. Paz, could you please introduce yourself to the Court, and spell your name for the Court Reporter.

A. My name is Liliana Paz—Liliana Paz. L-i-l-i-a-n-a, Paz, P-a-z.

Q. Ms. Paz, what is your position? What do you do for a living?

A. Currently, I occupy the position of General Secretary in the Ministry of Agriculture and Livestock in my country.

Q. What are your job duties in that position?

A. What I do is attest to the authenticity of the signatures of the Ministers. I help the Minister in matters having to do with legal affairs, institutional communication, international cooperation. In this section, all of the applications from private parties and from the Secretary itself are processed.

* * * * *

[63]

Q. If I could take your attention back to Resolution 030-95 for a moment. Does that resolution also set size restrictions for lobster?

A. 30, yes.

Q. What are the size restrictions?

A. The minimum size for lobsters is 5.5 inches, or 14.5 centimeters, and that's for the abdominal length.

Q. That would be the tail length?

A. I don't, I don't know. It says abdominal.

Q. Okay. Does it describe there how it's measured?

A. No, I don't know.

Q. What is your understanding that that means? What is—what does she understand that that means?

A. Which words?

Q. The measurement. Where is the measurement taken on the lobster, if she knows?

A. No, I don't know. That would be the technicians in fisheries that would know about that.

Q. Each of these resolutions that you have brought with you, [64] were they published in La Gaceta?

A. Yes.

THE COURT: In what?

MS. COLBOURN: La Gaceta.

THE COURT: Do you want to spell that for me?

MS. COLBOURN: L-a, second word is G-a-c-e-t-a.

Q. Ms. Paz, what is La Gaceta?

A. The Gaceta or Gazette is the official daily of the Republic of Honduras, or official register.

MS. COLBOURN: May I approach, Your Honor?

(Brief pause.)

MS. COLBOURN:

Q. Ms. Paz, I've handed you what's been marked as Government's Exhibit C. Do you recognize those documents?

A. Yes.

Q. What are they?

A. This is a publication of The Gazette. It's a photocopy of a publication of The Gazette.

Q. Publication of what?

A. Here it shows Resolution 001-95.

Q. And what about on the second page?

A. Resolution 030-95.

Q. And on the last page?

A. Resolution 031-97.

Q. Once a resolution is published in La Gaceta, what does that [65] mean as a legal matter in Honduras?

A. The publication in The Gazette would have the same meaning as a personal notification or service to the effect that if someone considers or feels that his or her rights have been injured, the person can file a petition before the appropriate authorities, and also for the—for it to be enforced.

Q. So, does it become effective after publication?

A. Yes.

Q. Are those three resolutions then, following their publication in La Gaceta, do they have legally binding force in Honduras?

A. Well, yes.

Q. In addition to the resolutions, the documents you brought, you said, contained a copy of The Fishing Law. Is that Decree Number 154 from 1959?

A. Yes.

Q. And the copy that you brought, was that a published La Gaceta version?

A. Yes.

Q. And that 1959 statute, is that still valid and binding in Honduras today?

A. Yes, entirely.

THE COURT: What was the date of that, please?

MS. COLBOURN: 1959.

(Brief pause.)

[66]

Q. Ms. Paz, I've just handed you what's been marked as Government's Exhibit D. Do you recognize that document?

A. Yes.

Q. What is it?

A. It's a photocopy of The Gazette in which the decision, 0008-93, is published. It publishes the industrial and health and hygiene regulations for the protection of fishermen—excuse me, for fishery products.

* * * * *

MS. COLBOURN:

Q. Is this document a regulation under Honduran laws?

[67]

A. Yes. These are Honduran regulations. These are valid regulations.

* * * * *

[74]

MS. COLBOURN:

Q. Ms. Paz, if I could turn your attention to Article 70, Subsection 3, of The Fishing Law.

A. Yes.

Q. Could you explain to the Court what that provision prohibits.

MR. COURTNEY: Judge, we would object to any interpretation. The statute speaks for itself.

MS. COLBOURN: Your Honor, we would agree, but [75] apparently Mr. Courtney did not when we were speaking this morning and argued that there is an interpretation issue as to the term "for profit." And that's the issue we would like to address.

MR. COURTNEY: Well, I don't think there's been any showing, Judge, that this lady from the administrative department—

THE COURT: Counsel, you're going to have to raise your voice. The interpreter is speaking up here, and I'm—I don't hear you.

MR. COURTNEY: I'm sorry. Judge, my point is, I don't think there's been a showing that this witness is competent to interpret fishing laws. She obviously has no experience in the fishing department and in matters of that sort, and she's not competent to interpret The Fishing Law.

MS. COLBOURN: Your Honor, she is the highest level attorney within the Ministry of Livestock and Agriculture, which is responsible for the fishery management program.

And she has testified that it is part of her job to provide advice on legal affairs to the Minister of that department. There is no more qualified official.

THE COURT: All right. She's also an attorney?

MS. COLBOURN: Yes, Your Honor.

THE COURT: All right. I'll overrule.

MS. COLBOURN:

[76]

Q. Ms. Paz, if you could answer the question, which was: Could you please explain to the Court what Article 70, Subsection 3, prohibits?

A. Article 70 speaks of sanctions that are assessed or imposed when someone violates these provisions contained in the Article. And Subsection 3 refers to the whoever destroys or collects for purposes of profit the eggs, larva of the fish—okay. There's a word quelonios, I'll get back to her. Okay. —turtles or other aquatic species. The purpose of establishing closed seasons is to protect the reproduction and maintain the resources—

MR. COURTNEY: Judge, the question was about Number 3, which is about destroying fish eggs.

MS. COLBOURN: Your Honor, if I could be allowed to ask the questions and let the witness explain her answers.

THE COURT: All right. I'll consider an objection, Counsel. I believe the answer that is being provided is not in answer to the question. I'll sustain it on that ground. You may ask the question again, Counsel.

MS. COLBOURN:

Q. Section 70—Article 70, Subsection 3, does that specifically address closed seasons, or does it address the harvest or collection of eggs?

A. It talks about harvesting or collecting eggs.

Q. You had mentioned that one of the—that Article 3 goes to [77] the harvest of eggs of fish or other aquatic species. Would lobster be considered one of the other aquatic species covered under that section?

A. Yes, of course, yes.

Q. Would this provision prohibit an individual in Honduras—

INTERPRETER: An individual?

Q. —in Honduras from capturing a lobster that was carrying eggs and removing the eggs from the lobster?

MR. COURTNEY: Judge, we renew our objection. She's not competent.

THE COURT: Is that the—wait one second. Is that the end of your question?

MS. COLBOURN: Yes, Your Honor.

THE COURT: All right. All right. Mr. Courtney.

MR. COURTNEY: And Judge, we object to her answering that. She's not competent—

THE COURT: All right. Overruled.

MR. COURTNEY: —to provide that testimony.

MS. COLBOURN:

Q. Ms. Paz, you can go ahead and answer.

A. I wasn't able to hear it because too many people were talking at the same time.

Q. I'll repeat the question. Does Subsection 3 of Article 70, would that prohibit an individual in Honduras from capturing a lobster that had eggs on it and removing the eggs from the [78] lobster?

MR. COURTNEY: Same objection.

A. It does prohibit it, because if they picked up a lobster, a lobster with eggs, they would have to detach them by handling them.

MS. COLBOURN:

Q. And the collection of lobster in Honduras, is that normally an activity done for profit?

A. As far as I know, yes.

Q. So, if someone were engaged in activity for profit under Subsection 3, would that be prohibited under Honduran law, the activity of capturing the lobster with eggs?

A. Yes, of course.

Q. Ms. Paz, are you familiar with the agreement we spoke about earlier, 0008-93, promulgated by SENASA?

A. SENASA, yes.

Q. What is SENASA?

A. Okay. It's a directorate, an independent directorate of the Secretariat of Agriculture and Livestock. What it means is national service, national—national service of agricultural health, including—the word "agricultural" in this case includes plants and animals.

Q. If I could turn your attention back to the Government's Exhibit marked A chart. If you could look at point number seven. I believe it's on the third page.

[79]

A. (Witness complies.)

Q. Is it a correct Honduran—is it a correct statement of Honduran law to say that it is prohibited under Honduran law under the agreement we have been discussing to export lobster without first having it officially inspected for

health and sanitation and processed at an approved establishment in Honduras?

A. That's right.

* * * * *

[92]

MS. COLBOURN:

Q. Ms. Paz, I've just handed you what's been marked as Government's Exhibit F. Have you seen that document before?

THE COURT: Mr. Courtney, I'm going to assume that you have a copy of this document unless you otherwise advise the Court.

MR. COURTNEY: Yes, sir. We don't know what it says, but I've got it.

MS. COLBOURN:

Q. Ms. Paz, have you seen that document before?

A. Yes.

MS. COLBOURN: Again, Your Honor, this document was obtained yesterday. The difficulty we've had is that the documents we were provided by the Defense Counsel were given to us on September 7th, the majority of them not translated into English. We immediately sought expedited translations, which we started receiving approximately 14 days later. We were still receiving the last of them the end of last week. Once we were able to digest them, because I don't speak Spanish or read it, we got in contact with the Honduran officials to ask them questions about the issues that were raised in these documents. The Honduran officials have reacted very quickly, but in order to prepare the documents and fax them up to explain what was going on, it took a few days. We got these yesterday, and we are translating them as fast as we can. We may have this [93] translation by this afternoon,

and we will provide it. We provided copies of the Spanish language documents as soon as we got them yesterday.

Q. Ms. Paz could you explain to the Court basically, without reading the whole thing, what that document says? To start with, who is it from?

A. It's signed by Juan Arnaldo Hernandez Espinoza, the Assistant General Prosecutor, or in that capacity. He's—he is an attorney.

Q. What is his relationship, if you know, professionally to the Fiscalia Especial para la Defensa de la Constitucion? I'm sorry, and this would be specifically Department of Islas de la Bahia, Department of the Islas de la Bahia.

Le me—I'm sorry, you're looking confused. Let me rephrase this.

(Brief pause.)

Q. Ms. Paz, the black binder I've just handed you is a copy of documents submitted by the Defense Counsel in this case on September 7th. Could you turn your attention to the document that's at tab number four of that folder?

A. (Witness complies.)

Q. Who is that document signed by?

A. From the public prosecutor's office.

Q. What is the relationship of the individual who signed that document with the gentleman who signed Government Exhibit F [94] that I put before you?

A. This is a higher organization than this organization here. The Special Prosecutor's Office for the Defense of the Constitution is subordinate to this other agency.

Q. And that other agency or the individual who signed Exhibit F, could you explain, just paraphrasing, what he says in Exhibit F for the Court?

A. He refers to about the legality or the effectiveness or the—whether these—in other words, whether these resolutions are legal, valid, or void.

Q. And what does he conclude regarding the ongoing validity of those resolutions in Honduras?

A. He says that these resolutions were issued under Article 5 of The Fishing Law. He said that these resolutions became mandatory by virtue of their publication in The Gazette. A substantial part of them talks about the way in which these resolutions were issued or what they came to regulate, saying that in the Law of Administrative Procedures, it says that any defect in form would only determine whether or not the—the act or action was voidable or not when it lacks the formal required—the formal requirements—the indispensable formal requirements to achieve their end or does not allow the parties to defend themselves.

Q. Does he provide a final conclusion as to the current validity of those resolutions in Honduras?

[95]

A. Yes, that they are valid, because to invalidate them, a procedure or proceeding would have to be conducted.

Q. And I'm guessing that it has not been conducted; is that what you're—

A. No.

Q. In addition to the document that you just looked at at tab number four in the Defendant's documents, have you had a chance to review the other documents filed by Defendant McNab?

A. Yes.

Q. Could you tell the Court your opinion of the conclusions generally of those documents.

A. These are opinions, legal opinions from some authorities of the country as to whether these resolutions are laws or constitute laws or regulations, whether or not they're null and void. And all of them give the opinion that this is not a law nor regulations and that they are null and void.

My opinion is that they are not laws or regulations because they do not have the form that would be required for them to be such. But in the absence of regulations, the Secretariat has implemented this form for a long time as an instrument to enforce The Fishing Law without going beyond the parameters set down by the law. And if they say that they're void, for them to be declared null and void, a procedure would have to be followed, and the person who deemed himself affected by one of these resolutions would have filed the appropriate appeal with [96] the—or the entity having jurisdiction. And to date, this has not happened.

* * * * *

[98]

MS. COLBOURN:

Q. Ms. Paz, one final question just to conclude. Resolution 001-95, 030-95, and 031-97, are they currently valid and binding legal requirements in the country of Honduras?

A. Yes.

* * * * *

[101]

CROSS EXAMINATION

BY MR. COURTNEY:

* * * * *

[112]

Q. Well, when Ms. Colbourn was asking you questions, you read from Mr. Hernandez' letter and suggested to the Court that Mr. Hernandez was suggesting that there could be a suit filed in Honduras to declare the resolutions void. Does that help you?

A. I know that there is an ex officio review of administrative actions. And there's also a procedure to void or render null and void for any statement or any declaration, whether it's properly issued or indirectly issued.

Q. Could that take two years?

[113]

MS. COLBOURN: Your Honor, if she could be permitted to finish her answer?

THE COURT: Let her finish the question first.

MR. COURTNEY: I'm sorry.

A. But we start out on the basis of the legitimacy of the actions by the Public Administration. And they are valid as long as someone does not initiate or bring a suit or initiate a proceeding to have them declared invalid or null and void.

Q. How long would such a proceeding take, possibly two years?

A. No. One advantage of the administrative procedure is that it's a very fast procedure. There are deadlines imposed by law to file a complaint. The deadlines, starting from the publication data, the time period begins to run. To date, no one has filed a complaint, neither the government attorney nor a private party.

Q. Well, let me ask you then, if the government attorney was to file a complaint or if a citizen was to file a complaint, would the Defender of the Republic be the—be the government attorney in that case?

INTERPRETER: Okay. Excuse me, the first—if a private party or a?

MR. COURTNEY: If a private party filed such a case, would the Defender of the Republic be the attorney on the other side?

A. The government attorney is the legal representative of the [114] state—of the government. However, the government attorney would replace the attorney from any one of the secretariats. In this case, it would be the Secretariat of Agriculture and Livestock. Before a legal trial is instituted or initiated, the administrative recourse—administrative recourse has to be exhausted.

* * * * *

[126]

THE COURT: All right. I think the witness can come down. All right. Mr. Briskman, call your expert out of turn.

MR. BRISKMAN: Saul Litvinoff.

THE COURT: Thank you, ma'am. Thank you.

THE WITNESS: (In English:) You're welcome.

(Brief pause.)

SAUL LITVINOFF,

having first been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRISKMAN:

Q. Would you state your name to the Court, please.

A. My name is Saul Litvinoff.

Q. And where do you live, Mr.—Professor Litvinoff?

A. My domicile is in the City of Baton Rouge, Louisiana.

Q. And what is your occupation, please, sir?

[127]

A. I'm a Professor of Law at the Law Center of the Louisiana Law University.

Q. And how long have you held that position?

A. For 39 years.

Q. You were born where, please, sir?

A. In Buenos Aires, Argentina.

Q. And do you speak Spanish fluently?

A. I do.

Q. Do you speak—are you fluent in any other languages besides Spanish and, obviously, English?

A. French, German, Italian, Latin, classical Greek, and some English.

Q. Professor Litvinoff, beginning with your college degrees, would you tell the Court where you obtained degrees in various universities—

THE COURT: Counsel, how about just saying where he's going. I'm not going to take much more time with this. If you don't get to the meat of it, we're going to continue it over until tomorrow.

MR. BRISKMAN: Well, I will be very direct, Your Honor.

THE COURT: All right. You set out, and he can say yes or no.

MR. BRISKMAN:

Q. Did you receive an LL.B. from the University of Buenos [128] Aires in 1949?

A. Correct.

Q. Did you receive a Master of Law from Yale University in 1964?

A. Correct.

Q. Have you received various honors relative to your legal practice, including the Order of the Coif, the Rivers Award for outstanding contributions to Louisiana studies, were you awarded The Center for Louisiana Studies at the University of Southwestern Louisiana (sic)?

A. Correct.

Q. Have you received various declarations from France, Argentina, as well as Honduras?

A. Correct.

Q. Are you a member of the Louisiana Bar, the—or the State Law Institute, the Argentine Bar, the Costa Rican Bar, and the Honduran Bar, both honorary members for Costa Rico and Honduras?

A. Correct.

Q. Have you practiced law from 1959 to 1962 in Buenos Aires, and then additionally from 1954 and 1959 in Buenos Aires?

A. That is correct.

Q. Have you held academic positions at LSU from 1965 to the present?

A. That is correct.

[129]

Q. Have you also held academic positions at the University of Puerto Rico and as a visiting law professor at the Catholic University in Belgium?

A. At the City of Louvain in Belgium, that is correct.

Q. And you were a visiting professor at the University of Puerto Rico; is that right?

A. Correct.

THE COURT: Counsel, we're going to give you 30 minutes to examine the witness, and you can use it as you choose.

MR. BRISKMAN: Your Honor, I would offer as exhibit to the Court the resume of Professor Litvinoff.

MR. MURTHA: No objection, Your Honor.

THE COURT: All right.

(Brief pause.)

MR. BRISKMAN:

Q. Professor Litvinoff, at my request, did you have an opportunity to review various documents which included resolutions of the country of Honduras?

A. Yes.

Q. Did you review those resolutions, Resolution Number 003, 1980, and Resolution Number 30 of 1995, of Honduras?

A. I have.

Q. Were you asked to review those as to whether or not they constituted—did you also have an opportunity to review the [130] indictment, the supplemental indictment that was—superseding indictment that was filed in this Court against Mr. McNab and others?

A. I have.

Q. Did you review in conjunction therewith the various regulations and articles of Honduran law that Mr. McNab and others were allegedly charged with violating or charged with allegedly violating?

A. I have.

Q. All right. Did you reach conclusions relative to the Honduran law cited in that indictment, including various resolutions?

A. I have reached conclusions concerning the resolutions.

Q. All right. And what is your opinion concerning those resolutions?

A. That those so-called resolutions attempt to be regulations. Actually, a resolution is an order similar to a judicial decision that puts an end to a dispute, a particular dispute. What those resolutions attempt actually to be are regulations implementing the application of a particular statute.

Q. Were the resolutions that you reviewed, did it have any kind of regulatory force, in your opinion?

A. In my opinion, they lack regulatory force because they are not regulations issued in the proper manner according to the Honduran constitutional procedure and according to the Honduran [131] law of organization of the administration and according to the Honduran law of administrative procedure.

Q. And what did you base your conclusions on, Professor?

A. That a regulation that implements the application of a particular statute must be issued by the president of the republic, whose firm—well, let me term a different phrase—must be co-signed by the pertinent minister with notice to the attorney general of the republic, and finally, published in La Gaceta.

Q. Did the resolutions that you reviewed meet those requirements?

A. The resolutions I reviewed do not meet those requirements.

Q. And as such, do they constitute Honduran law or not?

A. In my opinion, as such, those acts are stricken with absolute nullity.

Q. Are you familiar with the Honduran Constitution?

A. I am.

Q. Were you familiar with the Honduran Constitution before I engaged your services?

A. I have.

Q. And did you review these purported resolutions or regulations in conjunction with the Honduran Constitution?

A. I saw that.

Q. And what—does the Constitution provide a procedure for the enactment of Honduran law?

[132]

A. According to the Constitution, Articles 3 and 21, if I remember properly, the enactment of statutes is the supreme contribution of the legislative power. Now, later articles, and if I recall properly, 245 and 248, entitle the president to implement the application of those statutes or laws through regulations issued by him.

Q. Were these documents that you reviewed that purported to be Honduran law, did they meet the requirement to even be a resolution?

A. They don't.

Q. And why is that?

A. Excuse me, have you asked whether they meet the requirements to be a resolution?

Q. Do they meet the requirements to be regarded as a regulation?

A. To my mind, they don't.

Q. And why is that, please, sir?

A. In the first place, the way in which they have been labeled. In the second, the lack of a signature of the proper authorities to issue a valid regulation.

* * * * *

[135]

Q. Professor, the resolutions that you reviewed contained in the superseding indictment, are they void or voidable?

A. To my—they are void, that it's absolutely void.

Q. And do they or do they not constitute Honduran law, being void?

A. Void acts do not constitute valid law.

Q. Did you review the various opinions that were submitted by the Defense, including the advisory opinion of the Attorney General of Honduras?

A. I have.

Q. The opinion of the special ad hoc commission appointed by the Honduran Bar Association?

A. I have.

Q. Did you also review the opinion of the Defender of the Constitution?

A. I have reviewed that opinion.

Q. And various opinions by Attorneys Dionisio Matute and Dr. Silva?

A. That is correct.

Q. And do you concur—did you also review the Supreme Court [136] opinion, Supreme Court of Honduras?

A. I have.

Q. And do you concur in what you have reviewed of those writings?

A. To my mind, the conclusions contained in those statements are perfectly correct.

* * * * *

[137]

CROSS EXAMINATION

BY MR. MURTHA:

* * * * *

[143]

Q. Very well, sir. And you are aware that the size, the minimum size limitation on Honduran lobster was set forth in a resolution that was published in La Gaceta?

A. That resolution was published, yes.

Q. And you are aware that there is a legal mechanism for challenging that resolution if somebody so desired?

A. I am.

* * * * *

[149]

THE COURT: All right, sir. Let me ask you a few questions, please. You are aware, I take it, that Honduras has resolutions that you have reviewed that affect or attempt to affect the fishing industry; is that correct?

THE WITNESS: I have, yes.

THE COURT: All right. And who are those resolutions prepared by?

THE WITNESS: I have seen some prepared by secretaries general of a particular ministry or department or the head of a particular agency.

THE COURT: All right, sir. Is that part of the executive department?

THE WITNESS: Those agencies or ministries, yes, they are, they are part of the executive power, Judge, yeah.

THE COURT: All right, sir. And you are saying that it is your opinion that notwithstanding the fact that the [150] executive department had passed these resolutions, that they have not complied with Honduran law, which would make those resolutions applicable to individuals who are covered by Honduran law; is that correct?

THE WITNESS: That is correct, Judge. According to Articles 245 and 248 of the Honduran Constitution, it says regulations to be valid should be issued by the President of the Republic, his signature—well, it should be co-signed by the pertinent minister, that the regulations should be advice to the Attorney General—

THE COURT: And that's what I have. And it's your position that these all resolutions, to be effective, must be issued by the President of the Republic?

THE WITNESS: Correct.

THE COURT: All right. Thank you, sir. That's all I have.

* * * * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID HENSON McNAB, ROBERT BLANDFORD, ABNER SCHOENWETTER, and DIANE HUANG, Defendants.	CRIMINAL NO. 00-0079 SEPTEMBER 28, 2000 COURTROOM 2B U.S. FEDERAL COURTHOUSE MOBILE, ALABAMA VOLUME II

CONTINUATION OF THE MOTION HEARING
BEFORE THE HON. RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

* * * * *

[196]

MS. COLBOURN: We would call as the last witness Special Agent Paul Raymond.

SPECIAL AGENT PAUL WILLIAM RAYMOND,

having first been sworn, testified as follows:

* * * * *

[216]

CROSS EXAMINATION

BY MR. COURTNEY:

* * * * *

[221]

Q. Now, you mentioned to the Court that what started all of this was an anonymous fax that your office received, correct?

A. Yes, that's correct.

Q. And that's what kicked off your checking the Caribbean Dream Company's cargo on the Caribbean Clipper in Bayou La Batre in February of '99?

A. Correct.

Q. And that anonymous fax said that there were 30 percent undersized lobsters on the boat, didn't it?

A. I think it did say that.

Q. And then the case was resolved, and y'all did some packing down in Florida, and you found about three percent undersized lobster on the shipment, didn't you?

A. Are you referring to by weight?

Q. Yes, sir.

A. I don't recall. It's a couple thousand pounds. I don't recall the percentage—

Q. We calculated it. It's approximately three-and-a-half percent, is it not, or do you disagree with that?

MS. COLBOURN: Your Honor, he's testifying.

A. I've never calculated the percent.

THE COURT: All right. Counsel, you can offer your [222] evidence later. Don't testify.

MR. COURTNEY:

Q. How many pounds of undersized lobster did you find in the 70,000-pound shipment?

A. Several thousand pounds.

Q. A couple?

A. We seized the 70,000 pounds of egg-bearing and undersized.

Q. Agent, I was asking you about undersize. We're trying to get percent here. How many pounds of undersized lobster did you find?

THE COURT: Counsel, let him answer the question. We'll understand what he's saying.

A. I'd have to look at my notes to see exactly how many undersized pounds there were. Several thousand.

Q. Was it approximately three or four percent?

MS. COLBOURN: Objection, Your Honor, asked and answered.

THE COURT: Well, if he can estimate the three, the several thousand, he may. If he can't, it's not necessary.

A. I recollect that there were about a total of 7,000 total pounds that was seized, combination of egg-bearing females and undersized tails.

Q. Do you recall what the percentage of undersized tails alone [223] was?

A. The percentage?

Q. Or the number of pounds.

A. By weight?

Q. By weight.

A. It would be somewhere around two or 3,000 pounds divided by 70,000 pounds.

Q. So, if it's 2,000 pounds, it would be about three percent?

A. I'll – I agree with you on the math.

* * * * *

[242]

EFRAIN MONCADA SILVA,

having first been sworn through the interpreter, testified as follows:

* * * * *

[244]

DIRECT EXAMINATION

BY MR. COURTNEY:

Q. Would you state your name for the Court.

A. (Witness answers in Spanish.)

Q. And where do you reside?

THE REPORTER: Excuse me, excuse me. I need to get—

THE COURT: Wait. I didn't hear the name.

INTERPRETER: Would you—(speaking in Spanish)—cite the name for the Court. And he just mentioned his name.

THE COURT: What is his name?

INTERPRETER: Efrain Moncada Silva.

THE COURT: Could you spell that, please?

INTERPRETER: Yes. E-f-r-a-i-n, Moncada, M-o-n-c-a-d-a, Silva, S-i-l-v-a.

MR. COURTNEY:

[245]

Q. And your date of birth, please, sir?

A. February 14th, 1933.

Q. And how long have you been a licensed attorney, Professor Silva?

A. 40 years.

Q. And have you practiced law in Honduras?

A. Yes.

MR. COURTNEY: Judge, if I could, his curriculum vitae is part of Exhibit Seven. With the Court's indulgence, I'll just hit the high points and perhaps save us some time.

THE COURT: All right. If you will, just state them all. If you would, you said he's a licensed attorney, but you did not say where.

MR. COURTNEY:

Q. Are you a licensed attorney in Honduras, Professor?

A. Yes.

Q. And other countries?

A. No.

MR. COURTNEY: Judge, the curriculum vitae reflects that Professor Silva received a Doctorate of Law in Buenos Aires in 1973, and that he has been a full-time professor at the Faculty of Law and Social Sciences at the University of Honduras, and that he teaches administrative law, constitutional law, administrative procedures, administrative legislation, advanced administrative law. [246]

He has held a number of important positions within the Government of Honduras. He's been the Advisor of the Board of Directors of the Institute of Social Security, the Advisor to the Ministry of Communications, Public Works and Transport. He's been a judicial consultant. He's been a legal advisor to the National Enterprise of Electric Energy. He's an advisor of the National Congress. He's an advisor of—he's been an advisor of the Secretary of Treasury. He has been a Minister of Governing and Justice in the Republic of Honduras.

He has published—he is a member of a number of professional organizations, including the Bar Association of Honduras, Inter-American Lawyers Federation, et cetera, as referenced at paragraph 11.

He's received a page full of distinguishments itemized at article 12. He has published a page-and-a-half of articles concerning various aspects of Honduran law.

THE COURT: Including constitutional law?

MR. COURTNEY: Yes, sir.

THE COURT: Very good. Thank you.

* * * * *

[248]

MR. COURTNEY:

Q. Professor Silva, were you requested to provide a legal opinion regarding certain of the laws and/or resolutions referenced in the indictment?

A. Yes.

Q. And at the time, did you understand from reviewing the indictment that those were Resolutions 003-80 and 030-95 which addressed size limits of eggbearing lobster and/or closed season?

INTERPRETER: Could you repeat that? Let me go slowly.

Q. I'm sorry. From your review of the indictment, did you understand that the laws that Mr. McNab was charged with violating—

INTERPRETER: Go back one more.

Q. That the laws that Mr. McNab was charged with violating were—included Resolution 003-1980 and 030-1995?

A. Yes.

Q. While sitting in this proceeding, have you also heard from the Government that they are contending that Resolutions 001-95 and 031-97 have been violated?

INTERPRETER: Okay. Go back again.

Q. While attending this proceeding, have you also learned that the Government is contending that Mr. McNab violated [249] Resolutions 001-1995 and 031-1997?

A. Yes, he has.

Q. Have you reviewed those resolutions as well?

A. (No audible response.)

Q. Do the—

THE COURT: Counsel, I'm not getting the answer.

A. Yes.

THE COURT: You're going to have to tell—when he says yes, even if he shakes his head, I'm not watching him, I'm listening to you. So, you have to speak up. Thank you.

INTERPRETER: Okay. Yes, I will.

MR. COURTNEY:

Q. And do the opinions expressed in your letter opinion apply equally to Resolutions 001-95 and 031-97?

INTERPRETER: Please repeat.

Q. Do the opinions set forth—

THE COURT: Did he say yes?

INTERPRETER: No, no. I have to ask him to repeat twice because he's asking and going too long with sentences.

MR. COURTNEY:

Q. Do the opinions contained in your legal opinion apply equally to Resolutions 001-95 and 031-97?

A. Yes. They have the same accusation—the same weaknesses. Yes, because they have the same weakness. Thank you.

Q. Okay. Let's refer to question one in your legal opinion.

[250]

INTERPRETER: Let's—

Q. Refer to paragraph one of the legal opinion. It states that the—the first question is whether the referenced resolutions have the character of law.

INTERPRETER: Repeat that again, please.

Q. The question is whether the referenced resolutions—

INTERPRETER: Stop there.

Q. —have the character of Honduran law.

A. No, it doesn't have the character of law.

* * * * *

[251]

MR. COURTNEY:

Q. And then question number two, Professor Silva, was whether the resolutions constitute regulations or regulamento under Honduran law?

INTERPRETER: Repeat that, please.

Q. Question number two is whether the resolutions—

[252]

INTERPRETER: Go ahead.

Q. —constitute regulations or regulamento. And is your conclusion or opinion in that regard stated at Subparagraphs A and B?

INTERPRETER: Could you repeat that last resolution?

MR. COURTNEY:

Q. Subparagraphs A and B. Please read your opinion at Paragraphs A and B about whether they constitute resolutions or not.

A. Letter A: "Since they have not been issued by the President of the Republic, we went against this established in the Article 245, Attribution Number 11, of the Constitution of the country."

Q. And then read Paragraph B.

A. "Upon not accepting the form of the agreement, the legal dispositions were broken that we have quoted in the Code of Administrative Procedures of 1930."

* * * * *

[254]

Q. Professor Silva, question three says if they do not have the character of either law or regulation, do Resolutions 003 of 31 March 1980 and 030-95 have legal effect.

* * * * *

[255]

MR. COURTNEY:

Q. Question three. Okay. Read him question three.

(Interpreter complies.)

A. The resolutions do not have the legal effect.

* * * * *

[257]

Q. Professor Silva, please explain to Judge Vollmer why you are of the opinion that the resolutions involved in this case have no legal effect in Honduras?

A. Gladly. First of all, because they have—the defect of incompetency because the power of regulation in Honduras only belongs to the President of the Republic and not the Secretary of State or the Ministers, if you want—State Ministers. Then the Minister has appropriated powers that belong to the President of the Republic that are in the Constitution.

And we in Honduras in Article 315 of the Constitution, we have a mechanism of automatic supremacy of the Constitution. What it says, when there is incompatibility between the Constitution and the law or any subordinated norm, the Constitution prevails. What it means, that any law or regulation that is against the Constitution, no public authority can apply those rules. And it would incur—oh, it [258] would incur in responsibility for them.

Besides, Article 321 in the Constitution established that the bureaucrats of the State do not, do not have any power attribution than the one established by the law, and any action executed at the—outside the law is null and implies responsibility.

When the Minister appropriate the power of regulation attributed by the Constitution in the Article 245, Section 11, ring forth in Article 248, they have appropriated a power that they do not have and the Constitution has been violated. The Secretary of States or the Minister—State Ministers, according to the General Law of the Administration, Article 36, Section 6, can only be enacted—can only enact actions related—instruments related to the—with the internal administration of the office, and no regulations or—that has to do with individuals, with third parties in general.

* * * * *

[261]

[By Mr. Courtney:]

Q. Okay. Have you reviewed the opinion of the Defender of the Republic?

INTERPRETER: Could you repeat that, please?

Q. Defender of the Republic. Has he reviewed the opinion of the Defender of the Republic?

A. Yes.

Q. Who is the Defender of the Republic?

A. The Attorney General of the Republic is the representative of the Government of Honduras or the State of Honduras.

THE COURT: Is that his complete answer?

INTERPRETER: Yeah.

THE COURT: What's his name?

A. The name is the lawyer Ramon—

THE COURT: Would you spell it?

[262]

A. Ramon, R-a-m-o-n, with an accent "n," Antonio, A-n-t-o-n-i-o, and then Troche, T-r-o-c-h-e—Trochez with a "z" on the end. It's -c-h-e-z.

MR. COURTNEY:

Q. And what responsibility does he have in the Honduran legal system?

A. To represent the State upon the demands or the—upon the the lawsuit or legal suits that are formulated or brought to the State and, of course, to defend the State.

Q. Is he authorized to express opinions concerning Honduran legal issues?

INTERPRETER: Repeat that again, please, slow.

Q. Is he authorized to speak on behalf of the Honduran government?

A. Yes. He has—he representative of Honduras.

Q. Did you hear Ms. Paz testify yesterday?

A. Yes.

Q. Concerning the possibility of an annulment proceeding, legal proceeding, in Honduras?

A. (No audible response.)

Q. Did he hear her testify about that?

A. Yes, he heard her testify.

Q. Is he familiar with such a proceeding?

A. Yes.

Q. Has he handled such proceedings?

[263]

A I have fought against the Attorney General in court.

Q. On how many occasions in such proceedings?

A Two or three times in a lawsuit, lawsuit.

Q All right. How long does it take to conclude such a proceeding in Honduras?

A. A process of nullification in the administrative legal fight, yeah, takes—it takes two or more years. At this moment, I have five cases not against the Attorney General. It's taking longer than two years, and we are in appeal, appeal, and we're still in appeal.

Q. If such a case was filed in Honduras, who would be the person responsible for stating the position of the Honduran government?

A. The Attorney General.

Q. Would that be the Defender of the Republic?

A. He's the representative of the State.

Q. Would it be the same person who has submitted Exhibit One in this case?

INTERPRETER: What's the number?

MR. COURTNEY: One.

A. That is correct. That is true, yes.

Q. And have you read the opinion of the Defender of the Republic?

A. But of course.

Q. What is his opinion?

[264]

A. The bottom line, he coincide with mine. He agrees with mine. If you want, he can state important point.

* * * * *

[267]

[By Mr. Courtney:]

Q. Now, did you hear Ms. Paz testify yesterday about the validity of the resolutions?

A. Yes, he heard her.

Q. Do you agree with her that the resolutions do not constitute Honduran law?

A. It does not constitute laws in Honduras.

Q. Do you agree with her that the resolutions do not constitute regulations as referred to in The Fishing Law?

A. They are not regulations either.

Q. Do you agree with her that they are invalid under Honduran law?

A. Okay. The resolutions do not have legal effect there in Honduras. Since I already explained, they violate or they go against the Constitution.

[268]

Q. Are the resolutions null or merely voidable?

A. They are null.

* * * * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID HENSON McNAB, ROBERT BLANDFORD, ABNER SCHOENWETTER, and DIANE HUANG, Defendants.	CRIMINAL NO. 00-0079 SEPTEMBER 29, 2000 COURTROOM 2B U.S. FEDERAL COURTHOUSE MOBILE, ALABAMA VOLUME III

CONTINUATION OF THE MOTION HEARING
BEFORE THE HON. RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

* * * * *

[286]

CONTINUED CROSS EXAMINATION
[of Professor Silva]

BY MR. MURTHA:

* * * * *

[307]

Q. Now, I'd like to draw your attention to Article 119. And that sets forth the process for getting a declaration of nullity, correct?

A. Only when it comes from the—from the administrative authority that is reviewing the act, not from the private party that is challenging the act. These are two different things. Here, the authority itself is reviewing the act.

Q. And the authority can be reviewing the act based based on the petition of a private party, correct?

A. No. That's through the process of filing challenges against administrative law, according to the law governing challenges filed against the administration.

Q. But as a result of those challenges filed against the administration, the agency is then in a position to declare the regulation or administrative instrument null—excuse me, is able to declare it null?

A. No. The authority in this procedure of Article 119 can review its own act when it considers its act to be absolutely null and void. This is entirely independent when the private party considers that there is an act that is null and void and then turns to the law governing administrative challenges in order to petition for the act to be declared null and void. [308]

The first is the—is done by the authority ex officio. That's why it says Chapter One, ex officio revision. The other is from—is the petition of a private party asking that the act be reviewed and annulled. That goes under the law governing challenges to the administration.

Q. Okay. And then finally, in your legal opinion at page four, you provide an example of an administrative instrument by the Education Department that was declared null and void because it regulates situations which are not contemplated in the law; is that accurate?

INTERPRETER: Excuse me, is that a resolution from the—

MR. MURTHA: I just said it was an administrative instrument.

INTERPRETER: Would you mind repeating the last part of the questions?

MR. MURTHA: Sure.

Q. What I'm saying is that in page four of your legal opinion, you cite an example of a case in which an administrative instrument issued by the Education Department was declared null and void. Are you familiar with that case?

A. I read it, including the opinion of the then Attorney of the Constitution, who is now the Assistant Attorney General, who has just issued an opinion in the case that is being brought forward in this Court, and at that time different from [309] today.

Q. My question is, simply, in the case you cite in your legal opinion, is it not the case that a court declared the—the Department of Education regulation null and void?

A. Yes. It was a court that was—a court for administrative challenges.

Q. And would you agree with me, Mr. Silva, that no Honduran court has declared any of the resolutions concerning lobsters that your legal opinion deals with null and void?

A. The declaration of nullity of the court was with regard to defects, of minor defects that had nothing to do with the constitution, with the power to regulate attributed to the President of the Republic, which is the case which in—with these resolutions.

Q. My question is: Has any Honduran court declared the lobster resolutions null and void?

A. As far as I know, No.

* * * * *

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID HENSON McNAB, ROBERT BLANDFORD, ABNER SCHOENWETTER, and DIANE HUANG, Defendants.	CRIMINAL NO. 00-0079 OCTOBER 23, 2000 COURTROOM 2B U.S. FEDERAL COURTHOUSE MOBILE, ALABAMA VOLUME VI

CONTINUATION OF THE JURY TRIAL PROCEEDINGS
BEFORE THE HON. RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

* * * * *

[865]

LILIANA PAZ,

having first been sworn, testified through the Interpreter, as follows:

[866]

* * * * *

DIRECT EXAMINATION

BY MS. COLBOURN:

* * * * *

[880]

* * * * *

MS. COLBOURN:

Q. Ms. Paz, returning to the chart before you, for the 1996-'97 fishing season, does the information in that chart to your knowledge accurately reflect the records that the Ministry held at the time the chart was prepared?

A. That's right.

Q. And when was this chart prepared?

A. March 27th—March 23rd of the current year.

Q. For the column that's headed '97 to '98, to your knowledge, is that an accurate summary of the records held by the Ministry for that lobster fishing season related to Mr. McNab's boats?

A. Yes, that's right.

Q. If you could look at the column under the header '98 to '99, does that column also accurately reflect the records that the Ministry held that that fishing season as of March of 2000?

A. Yes, March of this year.

Q. And in that column, does it indicate that there are either no reports—well, let me go back. In that column, there's a reference to "Pes.Nic." You see that?

[881]

A. Yes.

Q. There are also entries labeled "no report"; is that correct?

A. Yes.

Q. In that column, is there anywhere indicated the number of pounds of lobster caught by that boat during that season?

A. No, nothing.

Q. Is that because no report reflecting the number of pounds of lobster caught in Honduran waters for that season was in the Ministry files at the time this report was prepared?

MR. BRISKMAN: Object to leading, Your Honor.

THE COURT: Overruled

A. No, there's no landing reports.

MS. COLBOURN:

Q. By the time this report was prepared, should the landing reports for the 1998-'99 fishing season have been submitted to the Ministry?

A. Yes, I think so. Yes, that's right.

MS. COLBOURN: The Government would move for the admission of Government's Exhibit R9 with the exception of the redactions that were discussed at the sidebar.

THE COURT: Let me see you at sidebar. I don't know what that last question means.

(Sidebar conference, on the record:)

THE COURT: All right. I'm sorry. I led you into [881] that.

MS. COLBOURN: We would redact the 1995-'96 column.

THE COURT: That's correct.

MS. COLBOURN: And we would redact the 1998-'99 and the '99-2000 column, but her testimony will stand on that.

THE COURT: All right.

MR. BRISKMAN: That's what I understand your ruling to be.

THE COURT: That's correct. And I'll give you an exception to that. All right. Very good.

MR. BRISKMAN: Thank you.

(In open court.)

MS. COLBOURN: I've got nothing further, Your Honor.

THE COURT: All right. Cross?

CROSS EXAMINATION

BY MR. COURTNEY:

* * * * *

[889]

* * * * *

Q. Ms. Paz, what do you understand the facts to be in regard to whether or not Caribbean Fishery Company provided landing reports to DIGEPESCA for 1998?

A. I don't understand the question.

Q. Does DIGEPESCA have landing reports from Caribbean Fisheries for 1998?

A. I don't remember. I think they do.

Q. Well, I thought you testified on direct that there was no record of landing reports for '98 or '99.

MS. COLBURN: Objection, Your Honor. He's mischaracterizing her testimony.

MR. COURTNEY: Judge, I'm just trying to understand. I thought that's what she testified to, Ms. Colbourn.

THE COURT: All right. You may ask another question.

MR. COURTNEY:

Q. Does DIGEPESCA have landing reports from Caribbean Fisheries for 1998 and 1999?

A. Yes, it does, of course.

Q. And is McNab Exhibit—let me show you McNab Exhibit 60 (indicating).

MS. COLBOURN: Mr. Courtney?

MR. COURTNEY: (Indicating.)

(Brief pause.)

[890]

THE COURT: Counsel, is that already in evidence?

MR. COURTNEY: No, sir. We're going to offer it. Not yet.

THE COURT: All right. If you'd give me the exhibit number?

MR. COURTNEY: McNab 60.

THE COURT: I'm sorry?

MR. COURTNEY: McNab 60.

THE COURT: 60?

MR. COURTNEY: Yes, sir.

(Brief pause.)

THE COURT: All right. Counsel, would you ask the question again? I don't remember it either.

MR. COURTNEY:

Q. Do you recognize those documents, Ms. Paz?

A. Yes. These are the landing reports.

Q. For what years, ma'am?

A. '98.

Q. Do you see some '99's in there, Ms. Paz?

A. Yeah. '99, in January when they arrived there, when they get to the vessel, when they get there.

Q. All right. Now, look at the bottom of each page. And doesn't it show a carbon copy goes to the DIGEPESCA office in Tegucigalpa, which is the capital of Honduras?

A. Yes, it says the Statistics Unit, which is in Tegucigalpa.

[891]

Q. Does your office in Tegucigalpa not have those documents that I just provided to you?

A. Yes, but they were not there in March 2000.

Q. Is that why you testified earlier that there were no documents at DIGEPESCA in March of 2000, but do we now understand that they are there?

A. Yes, yes, after this document was signed.

* * * * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID HENSON McNAB, ROBERT BLANDFORD, ABNER SCHOENWETTER, and DIANE HUANG, Defendants.	CRIMINAL NO. 00-0079 SEPTEMBER 28, 2000 COURTROOM 2B U.S. FEDERAL COURTHOUSE MOBILE, ALABAMA VOLUME IX

CONTINUATION OF THE JURY TRIAL PROCEEDINGS
BEFORE THE HON. RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

* * * * *

[1317]

THE COURT: All right. What says the Government?

MS. COLBOURN: Your Honor, we have rested.

THE COURT: All right. Ladies and gentlemen of the jury, I will advise you at this time that the Government has rested its case. And before the Defendant goes forward to present its case, I want to further advise you that the Court has ruled as a matter of law that the Government has not satisfied its burden of proof as the allegations as to the shrimp and any activities as it related to the shrimp, the allegations in the indictment about any impropriety in the taking of shrimp.

So, that—you may put that out of your mind. We're not going to have evidence on that presented, and—I'm sorry. And you will not have that before you at the conclusion of the case.

The Government has also failed to prove that the lobster was taken out of season, that is, during the closed season. So, that issue will not be before you for decision. You will not have those two issues. I have instructed the Defendants that they would not offer evidence on those issues because it will not come before you. The Court has ruled that the [1318] Government has not satisfied its burden of proof that is necessary to get those issues before you, and I will so instruct you at this time.

* * * * *

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, VS. DAVID HENSON McNAB, ROBERT BLANDFORD, ABNER SCHOENWETTER, and DIANE HUANG, Defendants.	CRIMINAL NO. 00-0079 OCTOBER 27, 2000 COURTROOM 2B U.S. FEDERAL COURTHOUSE MOBILE, ALABAMA VOLUME X

CONTINUATION OF THE JURY TRIAL PROCEEDINGS
BEFORE THE HON. RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

* * * * *

[1578]

THE COURT'S ORAL CHARGE TO THE JURY

It is now my duty to instruct you on the rules of law that [1579] you must follow and apply in deciding this case. When I have finished, you will go to the juryroom and begin your deliberations. It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find any of the Defendants guilty of any of the crimes charged in the second superseding indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial,

and you must not be influenced in any way by either sympathy or prejudice for or against any Defendant or the Government.

You also must follow the law as I explain it to you whether you agree with that law or not, and you must follow all of my instructions as a whole. You may not single out or disregard any of the Court's instructions on the law.

The second superseding indictment or formal charge against the Defendants is not evidence of guilt. Indeed, every defendant is presumed by law to be innocent. The law does not require any defendant to prove his or her innocence or produce any evidence at all.

If a defendant elects not to testify, you should not consider that in any way during your deliberations. Also, you must bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence, and no adverse inferences may be drawn from his or her failure to do so.

[1580]

The Government has the burden of proving each Defendant's guilt beyond a reasonable doubt, and if it fails to do so as to any of the Defendants, you must find that Defendant or those Defendants not guilty.

Although the Government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any reasonable doubt concerning a defendant's guilt.

A reasonable doubt is a real doubt based upon reason and common sense after a careful and impartial consideration of all of the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesita-

tion in the most important of your own affairs. It is that degree of proof which produces a conviction of guilt in an unprejudiced mind.

In considering the evidence as to whether or not the Government has established the guilt of a defendant beyond a reasonable doubt, you are also charged that such reasonable doubt may arise not only from the evidence that has been produced but also might arise from a lack of evidence which would go to establish such guilt. If you are convinced that a defendant has been proved guilty beyond a reasonable doubt, say so by your verdict. If you are not so convinced, say so by [1581] your verdict.

As stated earlier, during your deliberations you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Anything the lawyers say is not evidence in the case, and what the lawyers say is not binding upon you except for the stipulations I will explain later. It is your own recollection and interpretation of the evidence that controls.

Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence, you may make deductions and reach conclusions which reason and common sense lead you to make, and you should not be concerned about whether the evidence is direct or circumstantial. You may consider both direct and circumstantial during your deliberations.

Direct evidence is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. Circumstantial evidence is indirect or nontestimonial evidence which proves a chain of facts or circumstances from which one might infer

the guilt or innocence of the Defendant. The law makes no distinction between the weight you may give to either direct or [1582] circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness in whole or in part.

Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did he or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did he or she seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things about which he or she testified? Did he or she appear to understand the questions clearly and answer them directly? Did the witness' testimony differ from the testimony of other witnesses or other evidence?

You also should ask yourself whether there was evidence tending to prove that the witness testified falsely concerning [1583] some important fact or whether there was evidence that at some other time the witness said or did something or failed to say or do something which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean the witness was not telling the truth as he or she remembers it because people

naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or only an unimportant detail.

In this case, you heard testimony of law enforcement officers. The testimony of a law enforcement officer is to be subjected to the same tests and given the same consideration as that of any other witness. No more or no less weight or credibility is to be given to his or her testimony simply because of his or her official capacity with the local, state, or Federal Government. Everyone, law enforcement officers and lay witnesses alike, is to be judged and treated in the same way.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an [1584] opinion concerning those technical matters. Merely because such a witness has expressed an opinion, however, does not mean you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

However, the testimony of some witnesses must be considered with more caution than the testimony of other witnesses. In this case, the Government called as some of its witnesses persons named in other indictments with whom the Government has entered into a plea agreement providing for the possibility of lesser sentence than to which the witness would otherwise be exposed. Such plea bargaining, as it is called, has been approved as lawful and proper and is expressly provided for by the rules of this Court.

A witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, including

witnesses who have entered into plea bargains with the Government, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, although a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses.

The fact that a witness has pled guilty to a crime charged in some other indictment is not evidence in and of itself of the guilt of any other person.

[1585]

When a witness is questioned about an earlier statement he or she may have made, such questioning is permitted in order to aid you in evaluating the truth or accuracy of the witness' testimony here at trial.

Testimony as to an earlier statement made by a witness is not ordinarily offered or received as evidence of the truth or accuracy of those statements, but such statements are referred to for the purpose of giving you a comparison and aiding you in making your decision as to whether you believe or disbelieve the witness' testimony which you hear at trial. Whether or not such prior statements of a witness are, in fact, consistent or inconsistent with his or her trial testimony is entirely for you to determine.

During the course of the trial, as you know from the instructions I gave you then, you heard evidence of acts of different—excuse me, of a Defendant which may be similar to those charged in the second superseding indictment but which were committed on other occasions. You must not consider any of this evidence in deciding if that Defendant committed the acts charged in the second superseding indictment. However, you may consider this evidence for other very limited purposes.

If you find beyond a reasonable doubt from the other evidence in this case that a Defendant did commit the acts charged in the second superseding indictment, then you may consider evidence of the similar acts allegedly committed on [1586] another occasion to determine, one, that the Defendant had-the state of mind or intent necessary to commit the offenses charged in the second superseding indictment; or two, that Defendant acted according to a plan or in preparation for the commission of the crime; or three, that the Defendant committed the act for which the Defendant is on trial by accident or mistake. You should consider such evidence only as to the Defendant to whom the witness—excuse me, as to whom the evidence was offered.

The law does not require the Government to call as witnesses all persons who may have been present at any time or place involved in the case or who may appear to have knowledge of the matters at issue in this trial, nor does the law require the Government to produce as exhibits all papers and things mentioned in the evidence. In considering the weight and effect of the evidence that has been produced, you may consider the Government's failure to call other witnesses or produce other evidence shown by the evidence in this case to be in existence and available.

If it is particularly within the power of either the Government or the Defendant to produce a witness who could give relevant testimony on an issue in the case, the failure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party. No such conclusions should be drawn by you, however, with regard to a witness who [1587] is equally available to both parties or where the testimony of that witness would merely be spec—excuse me, merely be cumulative. You must always bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

During the course of the trial, the parties stipulated, agreed, to certain facts. Such stipulations eliminated the need for a party to—excuse me, to prove such facts by any other means. As I indicated to you then, you are to consider the stipulated facts as being true, correct, and proven.

Having given you these general rules applicable in all criminal cases, I shall next discuss the specific statutes involved and the charges as they are set forth in the second superseding indictment. After doing this, I will discuss the elements of the offenses charged and tell you what the Government is required to prove in order to establish the guilt of each Defendant insofar as the charges are concerned.

The second superseding indictment contains numerous counts or charges against the four Defendants, David Henson McNab, Robert D. Blandford, Abner Schoenwetter, and Diane H. Huang. In all, one or more of these Defendants are named in 44 counts. I will not read the second superseding indictment to you because it is so lengthy, but you will be given a copy of it for your deliberations. I will, however, take this opportunity to explain to you the offenses charged in each of the counts [1588] and the elements of those offenses.

As I instructed you at the beginning of the trial, there are basically two categories of offenses charged in the second superseding indictment. The first category includes what we call conspiracy counts. The conspiracy counts charge that on or about specific dates, one or more of the Defendants conspired, agreed, with another person to commit an unlawful act.

The second category includes what we call substantive offenses. The substantive counts charge that on or about specific dates, one or more of the Defendants actually committed an unlawful act. I will instruct you first on the substantive offenses and then on the conspiracy offenses.

You are reminded that the Court has removed from your consideration all alleged violations concerning shrimp and closed seasons, and you are not to consider them in making your decision in this case.

Substantive offenses, Counts Two through 12. Counts Two through 12 charge that certain Defendants violated Title 18, United States Code, Section 545, unlawful importation, and Title 18, United States Code, Section 2, aiding and abetting, by knowingly bringing spiny lobster tails into the United States, in violation of Title 16, United States Code, Section 3372(a)(2)(A). Two Defendants, David Henson McNab and Robert D. Blandford, are named in Counts Two through Six. Three [1589] Defendants, David Henson McNab, Robert Blandford, and Abner J. Schoenwetter, are named in Counts Seven through 12.

Title 18, United States Code, Section 545 is the Federal law which makes it a crime or offense for anyone to import or bring into the United States any merchandise contrary to law.

Title 16, United States Code, Section 3372(a)(2)(A) is the Federal law which makes it illegal to import into the United States spiny lobster tails taken, possessed, transported, or sold in violation of and in a manner unlawful under Honduran law.

For purposes of your deliberations, you are instructed that Honduran law: One, prohibits one as of December the 5th, 1995, to capture spiny lobsters which measure less than five-and-one-half inches in abdominal length;

Two, prohibits one to harvest or destroy the eggs of any aquatic species, including spiny lobster, for profit. This includes a prohibition against the tearing out or in any other way separating the eggs from the female lobster for profit. You are instructed, however, that the Honduran law regard-

ing the destruction of eggs is to be considered only in relation to the conspiracy charge in Count One.

Three, requires lobster fishermen to dock their vessels and unload their catch in a Honduran port prior to exportation. This duty may be fulfilled by the fishermen by either docking the vessel that caught the lobster or transferring the catch to [1590] a licensed ship that in turn docks and unloads the catch.

Four, requires that businessmen and those who use any kind of boat for fishing activities or transportation of any fish species protected by law, including lobsters, report in writing to the governmental authorities the outcome of their fishing trip. The captain of any fishing boat has to report the departure and arrival of the boat to governmental authorities, pointing out places where the fishing was done and the species and amount caught.

Five, prohibits one to export lobster without first processing, packaging that lobster in Honduras, which includes the packing of lobster in boxes that have been paraffined and labeled with, A, the business name of the firm that makes the product; B, the weight; C, that it was inspected and approved of by the Honduran Ministry of Natural Resources; and D, the number assigned to the processing company.

A Defendant can be found guilty of the offenses charged in Counts Two, Three, Four, Five, Six, Seven, Eight, Nine, 10, 11, and/or 12 only if the Government proves each of the following elements beyond a reasonable doubt as to each Defendant as to each count: First, that the Defendant imported the spiny lobster tails at issue in that count into the United States; and second, that the importation was contrary to the Lacey Act, Title 16, United States Code, Section 3372(a)(2)(A), in that the lobster tails were taken, possessed, transported, or sold [1591] in violation of and in a manner unlawful under Honduran law; and third, that the Defendant

acted knowingly; that is, he knew the importation was contrary to law.

The Government is not required to prove that the Defendant knew exactly what law was violated when the lobster tails were imported into the United States. Rather, the Government must prove beyond a reasonable doubt that the Defendant was aware that the importation was illegal in one or more of the ways charged.

The term "transport" means to move, convey, carry, or ship by any means, or to deliver or receive for the purpose of movement, conveyance, carriage, or shipment.

The term "taking" means capture, kill, or collect.

Counts 13 through 27. Counts 13 through 27 charge that certain Defendants violated Title 16, United States Code, Section 3372(a)(2)(A), and 3373(d)(1)(B), the Lacey Act, and Title 18, United States Code, Section 2, by knowingly engaging in conduct that involves the sale and purchase of, offer of sale and purchase of, and intent to sell and purchase spiny lobster tails with a market value in excess of $350, and knowingly transported, sold, received, acquired, or purchased the spiny lobster tails in interstate or foreign commerce, knowing that the lobster tails had been taken, possessed, transferred, transported, or sold in violation or in any manner unlawful under Honduran law or Florida law. [1592]

Two Defendants, Diane H. Huang and Robert D. Blandford, are named in Counts 13 through 22 and in Counts 26 through 27. One Defendant, Diane H. Huang, is named in Counts 23 through 25.

As I explained above, the Lacey Act prohibits the importation of spiny lobster tails that were taken, possessed, transported, or sold in violation of Honduran law or Florida law. Additionally, the Lacey Act, specifically, Title 16, United States Code, Section 3372(a)(2)(A), and Section 3373(d)(1)(B), makes it a crime for a person knowingly to

sell in interstate commerce or foreign commerce spiny lobster tails with market value in excess of $350, knowing that the spiny lobster tails were taken, possessed, or sold in violation of Florida law or in violation of or in any manner unlawful under Honduran law or Florida law.

A Defendant can be found guilty of the offenses charged in Counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, and/or 27 only if the Government proves each of the following elements beyond a reasonable doubt as to each Defendant and as to each count:

First, that the Defendant knowingly engaged in conduct that involved the sale and purchase of, offer of sale or purchase of—that should be offer or sale or purchase of—and intent to sell or purchase in interstate or foreign commerce the spiny lobster tails at issue in that count; and second, that the market value of the spiny lobster tails actually taken, [1593] possessed, transported, or sold exceeded $350; and third, that the Defendant knew that the spiny lobster tails at issue in that count had been taken, possessed, transported, or sold in violation of or in a manner unlawful under Honduran law or Florida law.

The market value of spiny lobster tails may be established by the price the lobster tails would bring if sold on the open market between a willing buyer and a willing seller.

The term "interstate commerce" and "foreign commerce" are defined later in these instructions.

Note that Counts 13 through 22 charge that the spiny lobster tails were taken, possessed, transported, or sold in violation of Honduran law, while Counts 23 through 27 charge the spiny lobster tails were taken, possessed, transported, or sold in violation of Honduran law or Florida law.

As to Counts 23 through 27, it would be sufficient if the Government proves beyond a reasonable doubt that the lobster tails were taken, possessed, transported, or sold in viola-

tion of Honduran law or Florida law, but in order to return a verdict of guilty under those counts, you must unanimously agree that the Defendant knew that the spiny lobster tails had been taken, possessed, transported, or sold in violation of Honduran or Florida law or both.

The instructions I gave you before on Honduran law are equally applicable here. As for Florida law, you are [1594] instructed that Florida law prohibits: One, the harvesting or possessing of any spiny lobster with a tail measurement less than five-and-a-half inches; two, the harvesting or possessing of egg-bearing spiny lobster and/or possessing of spiny lobster or spiny lobster tails from which eggs, swimmerettes, or pleopods have been removed or stripped. The practice of stripping egg-bearing spiny lobster in order to remove the eggs is also prohibited. Three, any person, firm, or corporation to deal in any saltwater products, including lobster tails, without first paying for and procuring a saltwater products dealer license.

The Government is not required to prove that the Defendant knew of the existence of the Lacey Act. However, the Government must prove beyond a reasonable doubt that the Defendant knew of the illegal nature of the spiny lobster tails at issue.

In some situations, the law which a defendant is charged with breaking actually covers two separate crimes. One is more serious than the second one, and the second is generally called a lesser included offense.

In this case, with regard to the Lacey Act offenses charged in Counts 13 through 27, if you find that the Government has not proven a Defendant charged in these counts guilty of that crime as defined above, you should then proceed to decide whether the Government has proven beyond a reasonable doubt [1595] that the Defendant is guilty of the lesser included offense of Lacey Act misdemeanor violation,

Title 16, United States Code, Section 3372(a)(2)(A), and Section 3373(d)(2).

Before you can find Defendant Robert D. Blandford or Defendant Diane H. Huang guilty of the lesser included offense under one or more of the Counts 13 through 27, the Government must prove each of the following elements beyond a reasonable doubt: First, that the Defendant knowingly transported, sold, received, acquired, or purchased in interstate or foreign commerce the spiny lobster tails at issue in that count; and second, that the Defendant in the exercise of due care should have known that the spiny lobster tails had been taken, possessed, transported, or sold in violation of Florida law or Honduran law.

The term "due care" means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.

The previous instructions on Honduran law and Florida law are equally applicable here. Again, as in Counts 23 through 27, it would be sufficient if the Government proves beyond a reasonable doubt that the lobster tails were taken, possessed, transported, or sold in violation of Honduran or Florida law, but in order to return a verdict of guilty under those counts, you must unanimously agree that the Defendant knew that the spiny lobster tails had been taken, possessed, transported, or [1596] sold in violation of Honduran law or Florida law or both.

Counts 28 through 42. Counts 28 through 42 charge that certain Defendants violated Title 18, United States Code, Section 1957 monetary transactions in criminally derived property, and Title 18, United States Code, Section 2, by knowingly engaging and attempting to engage in, and aiding and abetting others to engage in and attempt to engage in, monetary transactions, namely, the transfer of funds or payment by check by, through, or to a financial institution affecting interstate or foreign commerce in criminally derived

property of a value greater than $10,000, such property having been derived from a specified unlawful activity, namely, importation contrary to law in violation of Title 18, United States Code, Section 545.

Two Defendants, David Henson McNab and Robert D. Blandford, are named in Counts 28 through 39. One Defendant, David Henson McNab, is named in Counts 40 through 42.

A Defendant can be found guilty of the offense charged in Counts 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, and/or 42 only if the Government proves each of the following elements beyond a reasonable doubt as to each Defendant and as to each count: First, that the Defendant knowingly engaged in or attempted to engage in a monetary transaction as described in the second superseding indictment; and second, that the Defendant knew the transaction involved criminally derived property; three, that the property had a value of greater than [1597] $10,000; and four, that the property was derived from a specified unlawful activity that's described in the second superseding indictment; and five, that the transfer of funds took place within the United States.

The term "monetary transaction" means the deposit, withdrawal, transfer, exchange, in or affecting interstate or foreign commerce of funds by, through, or to a financial institution.

The term "interstate or foreign commerce" is defined later in these instructions.

The term "criminally derived property" means any property constituting or derived from proceeds obtained from a criminal offense.

The term "specified unlawful activity" includes importation contrary to law under Title 18, United States Code, Section 545.

To prove that a Defendant knew the transaction involved the criminally derived property, the Government must prove beyond a reasonable doubt that the Defendant knew the funds used represented in whole or in part proceeds of a specified unlawful activity. It is sufficient if the Government proves beyond a reasonable doubt that the payment proceeds were commingled with other funds.

Count 47. Count 47 charges that the Defendant, Diane H. Huang, violated Title 16, United States Code, Section 3372(d), [1598] and Section 3373(d)(3)(A)(i), the Lacey Act, and Title 18, United States Code, Section 2, by knowingly making and submitting a false record, an account, or label for, and a false identification of, re-labeled boxes of spiny lobster tails imported from Honduras and processed at Sal-Serv as a product of the United States when the spiny lobster tails had been and were intended to be imported, exported, transported, sold, purchased, or received from a foreign country and transported in interstate and foreign commerce, and which knowing act involved the sale or purchase, or offer of sale or purchase, or the commission of an act with intent to sell or purchase, the spiny lobster tails with a market value of greater than $350.

The Defendant can be found guilty of the offense charged in Count 47 only if the Government proves each of the following elements beyond a reasonable doubt:

First, that the Defendant knowingly made or submitted a false record, an account, or label for, or a false identification of spiny lobster tails;

And second, that the spiny lobster tails had been or was intended to be imported, exported, transported, sold, purchased, or received from Honduras or transported in interstate or foreign commerce;

And third, that the Defendant's making or submission of a false record, an account, or label for, or the false [1599]

identification of the spiny lobster tails involved the sale or purchase of, the offer of sale or purchase of, commission of an act with intent to sell or purchase spiny lobsters with a market value greater than $350.

A label for spiny lobster tails is false when made or used if it is untrue and incorrect and is known to be untrue or incorrect by the person who made or used it, or is made or used with reckless disregard of or indifference to the truth with a conscious purpose of avoiding—avoid learning the truth.

Conspiracy offenses, Count One. Count One charges that beginning on or about August 4th, 1995, until on or about May the 10th of 2000, in the Southern District of Alabama and elsewhere, Defendants David Henson McNab, Robert D. Blandford, Abner J. Schoenwetter, and Diane H. Huang, in violation of Title 18, United States Code, Section 371, did knowingly conspire and agree with one another and with others to commit the following offenses against the United States:

A, to knowingly import and bring into the United States spiny lobster tails contrary to law, and receive, conceal, buy, sell, or facilitate the transportation, concealment, and sale of such lobster tails after importation, knowing the same to have been imported and brought into the United States contrary to law; that is, contrary to Title 16, United States Code, Section 3372(a)(2)(A), by importing from Honduras to the United States spiny lobster tails that were taken, possessed, [1600] transported, or sold in violation of or in a manner unlawful under Honduran law, all in violation of Title 18, United States Code, Section 545;

B, to knowingly engage in conduct involving the sale and purchase of spiny lobster tails having a market value exceeding $350 by importing, exporting, transporting, selling, receiving, acquiring, or purchasing said spiny lobster tails in interstate or foreign commerce, knowing said spiny lobster tails had been taken, possessed, transported, or sold in viola-

tion of Honduran law or Florida law, all in violation of Title 16, United States Code, Section 3372(a)(2)(A), and Section 3373(d)(1)(B);

C, to knowingly import and export spiny lobster tails, knowing that said spiny lobster tails were taken, possessed, transported, or sold in violation of Honduran law or Florida law, all in violation of Title 16, United States Code, Section 3372(a)(2)(A) and Section 3373(d)(1)(A) ;

And D, to knowingly conduct or attempt to conduct financial transactions, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity and which, in fact, involved the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity, that is, an offense under Title 18, United States Code, Section 545, all in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

You are instructed that as to conspiracies "B" and "C," the [1601] Defendant David Henson McNab is charged with violating the Lacey Act only with respect to Honduran law. He is not charged with violating the Lacey Act with respect to Florida law.

Title 18, United States Code, Section 371 makes it a separate Federal crime or offense for anyone to conspire or agree with someone else to do something which if actually carried out would amount to another Federal crime or offense. So, under this law, a conspiracy is an agreement or a kind of partnership in criminal purpose in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme or that those who were members had entered into any formal type agreement or that the members had planned together all of the details of the scheme or the overt acts which the indict-

ment charges would be carried out in an effort to commit the intended crimes.

Also, because the essence of a conspiracy offense is the making of the agreement itself followed by the commission of any overt act, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

A Defendant can be found guilty of an offense charged in Count one only if the Government proves each of the following [1602] elements beyond a reasonable doubt as to each Defendant:

First, that two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the second superseding indictment;

Second, that the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third, that one of the conspirators during the existence of the conspiracy knowingly committed at least one overt act as charged in the second superseding indictment;

And fourth, that such overt act was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An overt act is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing who all the other members are. So, if a Defendant has a general understanding of the unlawful purpose of the plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict that Defendant for con-

spiracy, even though the Defendant had not participated before and even though the Defendant played only a minor part.

Of course, mere presence at the scene of a transaction or [1603] event, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

In determining whether a conspiracy existed, you should consider the actions and declarations of all of the alleged participants. However, in determining whether a Defendant was a member of a charged conspiracy, you should consider only that Defendant's acts and statements. A Defendant cannot be bound by the acts or declarations of other participants until it is established that the conspiracy existed and that the Defendant was one of its members.

One who willfully joins an existing conspiracy is no less guilty of the crime of conspiracy than one of the originators or instigators of the conspiracy.

In this case, with regard to the alleged conspiracy, the indictment charges that the Defendants conspired to commit four separate crimes or offenses. It is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit all four offenses. It would be sufficient if the Government proves beyond a reasonable doubt that such Defendant willfully conspired with someone to commit [1604] one or more of those offenses, but in that event, in order to return a verdict of guilty, you must unanimously agree that the Defendant conspired to commit one or more of the four offenses that Defendant conspired to commit.

You must determine whether one or more of the several conspiracies charged in Count One existed. If you find that none of those four conspiracies existed, then you must acquit the Defendants. However, if you decide that one or more of the four charged conspiracies existed, you must then determine who the members were. And if you should find that a particular Defendant was a member of some other conspiracy, not one of the four that he or she is charged with in the second superseding indictment, then you must acquit that Defendant of that conspiracy charge. In other words, to find a Defendant guilty of conspiracy, you must unanimously find such Defendant was a member of one or more of the four conspiracies charged in the second superseding indictment and not a member of some other separate conspiracy.

The terms "knowingly" and "willfully" are defined later in these instructions.

Count 43. Count 43 charges that beginning on or about August the 14th, 1995, until on or about May 10th, 2000, in the Southern District of Alabama and elsewhere, the Defendant, David Henson McNab and Robert D. Blandford, in violation of [1605] Title 18, United States Code, Section 1956(h), did knowingly conspire and agree with one another and others to commit the following offense against the United States: To knowingly engage or attempt to engage in monetary transactions in criminally derived property that was of a value greater than $10,000, in violation of Title 18, United States Code, Section 1957.

The Defendant can be found guilty of the offense charged in Count 43 only if the Government proves each of the following elements beyond a reasonable doubt:

First, that two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the second superseding indictment;

Second, that the Defendant, knowing the unlawful purpose of the plan, willfully joined in it;

Third, that one of the conspirators during the existence of the conspiracy knowingly committed at least one overt act as charged in the second superseding indictment;

And fourth, that such overt act was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

I have already instructed you on the law as to conspiracy and as to Title 18, United States Code, Section 1957. Those instructions are equally applicable here.

Title 18, United States Code, Section 2. In Counts Two [1606] through 22, 26 through 42, and 47, Defendants are charged with violating Title 18, United States Code, Section 2. That statute provides that anyone who commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal. It further provides that whoever willfully causes an act to be done which if directly performed by him or her or another would be an offense against the United States is punishable as a principal. Thus, the guilt of a Defendant in a criminal case may be proved without evidence that he or she personally did every act involved in the commission of the crime charged.

The law recognizes that ordinarily, anything a person can do for himself or herself may also be accomplished through direction of another person as an agent or acting together with or under the direction of another person or persons in a joint effort.

So, if the acts or conduct of agents, employees, or other associates of a Defendant are willfully directed or authorized by a Defendant, or if a Defendant aids and abets another person) or persons by willfully joining together with that person or a crime, then the law holds conduct of that other person

though that Defendant had engaged in such conduct himself or herself. —

However, before any Defendant can be held criminally [1607] responsible for the conduct of others, it is necessary that the Defendant willfully associate in some way with the crime and willfully participate in it. Mere presence at the scene of a crime or even knowledge that a crime is being committed are insufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole possession or joint possession. A person who knowingly has direct physical control of something on or about his person is in actual possession of it. A person who is not in actual possession but who has both the power and intention to take control over something either alone or together with someone else is in constructive possession of it.

If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

Whenever the word "possession" has been used in these instructions, it means actual as well as constructive possession, and also sole as well as joint possession.

You will note that the second superseding indictment charges that the offenses were committed on or about certain dates. The Government does not have to prove with certainty [1608] the exact dates of the alleged offenses. It is sufficient if the Government proves beyond a reasonable doubt that the offenses were committed on dates reasonably near the dates alleged.

Also, the second superseding indictment alleges that approximate number of pounds of spiny lobster tails and approximately—excuse me—and approximate amounts of monetary funds were used in the offenses charged. The Government is not required to prove the exact or precise number of pounds of lobster tails or the amount of monetary funds alleged in each count.

The term "interstate commerce" means commerce or travel between the states, territories, and possessions of the United States.

The term "foreign commerce" means commerce or travel between any part of the United States and any place outside the United States.

Commerce includes, among other things, travel, trade, transportation, and communication.

It is not necessary for the Government to show that the Defendant actually intended or anticipated an effect on interstate or foreign commerce. All that is necessary is that the Government prove that the Defendant's actions affected interstate or foreign commerce.

As to the Lacey Act counts, the element of interstate or [1609] foreign commerce is satisfied if the Defendant knew that the spiny lobster tails at issue would be transported in interstate or foreign commerce and took steps that began or furthered the spiny lobster tails' movement in such commerce.

The word "knowingly," as that term has been used in these instructions, means that an act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The word "willfully," as that term has been used in these instructions, means that an act is committed voluntarily and purposefully and with the specific intent to do something the

law forbids; that is to say, with bad purpose either to disobey or disregard the law.

When knowledge of the existence of a particular fact is an essential part of the offense, such knowledge may be established if the Defendant is aware of a high probability of its existence unless the Defendant actually believes that it does not exist.

So, with respect to the issue of the Defendant's knowledge in this case, if you find from all of the evidence beyond a reasonable doubt that the Defendant believed that he or she committed the actions charged and deliberately and consciously tried to avoid learning that the spiny lobster tails at issue had been taken, possessed, transported, or sold in violation of Florida law or Honduran law as charged in order to be able to [1610] say if apprehended that he or she did not know that information about the contents of the shipment, you may treat such deliberate avoidance of positive knowledge as the equivalent of knowledge.

In other words, you may find a Defendant acted knowingly if you find beyond a reasonable doubt either, one, that the Defendant actually knew that the spiny lobster tails at issue had been taken, possessed, transported, or sold in violation of foreign or state law; or two, that he or she deliberately closed his or her eyes to what he or she had every reason to believe was the fact.

I must emphasize, however, that the requisite proof of knowledge on the part of the Defendant cannot be established by merely demonstrating that the Defendant was negligent, careless, or foolish.

As used in these instructions, the term "spiny lobster" refers solely to the Caribbean spiny lobster bearing the scientific name panularis argus.

A separate crime or offense is charged against each of the Defendants in each count of the indictment. Each charge and

the evidence pertaining to it should be considered separately. Also, the case of each Defendant should be considered separately and individually. The fact that you may find a Defendant guilty or not guilty as to one of the offenses should not affect your verdict as to that Defendant as to the other [1611] offenses charged.

I caution you, members of the jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offenses alleged in the second superseding indictment. Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted, the matter of punishment is for the Judge alone to determine later.

Now, I think I have given you as briefly as possible the various rules and principles which are to govern you in your deliberations and in your determination of the factual questions which are yours for decision. Any verdict you reach in the juryroom, whether guilty or not guilty, must be unanimous. In other words, to return a verdict, you must all agree. Your deliberations will be secret, and you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury.

While you are deliberating—excuse me, while you are discussing the case, you should not hesitate to re-examine your own opinion and change your mind if you become convinced that [1612] you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with. Remember that in a very real way, you are judges, judges of the facts. Your only interest is to seek the truth from the evidence in the case.

You may return a verdict of guilty or not guilty as your judgment dictates, or you may disagree or fail to reach a verdict. I hope you will be able to agree and reach a verdict, but the important thing is that you follow the law and the evidence in this case, and if in so doing all 12 of you are unable to agree on a verdict, it is your privilege to so advise this Court. It is for this latter reason alone that I mention your right to disagree.

Any notes that you took during the course of this trial should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence or lack of evidence. If you did not take notes or do not have a note about a particular matter, you should rely upon your own independent recollection of the proceedings, and you should not be influenced by notes of others. Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Upon retiring to the juryroom, you will select one of your number to act as your foreperson. The foreperson will then preside over your deliberations and will sign any verdict to [1613] which you all agree. It will also be the duty of the foreperson to serve as your spokesperson in any further proceedings before this Court.

The exhibits which have been introduced in evidence will be delivered to you for your consideration before you begin your deliberations.

Although the Court will instruct you on the procedure for asking the Court a question during your deliberations, keep in mind that the only questions which the Court can answer are questions on the law. If you have a question on the law, the Court's response will be in the form of an additional jury instruction. The Court cannot answer factual, evidentiary questions. As stated above, you and you alone are the judges of the facts, and you must determine the facts based on the

evidence that has been presented. No further evidence will be presented, and you will have—and you must resolve all factual, evidentiary questions based on the evidence presented.

Should it become necessary for you to communicate with the Court on any matter connected with the case while you are deliberating, I admonish you you must not disclose to the Court how you stand numerically or otherwise, and this admonition should be adhered to until the jury has reached its verdict.

When you have reached your verdicts or if you have a question that you desire to ask the Court, I have prepared a written form which you should fill out and have your foreperson [1614] sign. This written form contains a report that you have reached a verdict as to all Defendants or that you have a question for the Court.

In the event you have reached unanimous verdicts, you will complete that portion of the form that states, "The jury has reached its verdicts," and you will fill in "yes" and have your foreperson sign.

In the event you have a question for the Court, you will fill in the form and answer "no" to the portion of the form that states, "The jury has reached unanimous verdicts," and under the form that says, "The jury has the following questions," you will write on this form, using the back of the paper if necessary, the question or questions you have for the Court, after which time the jury foreperson will sign the form and give it to the marshal. This form is used to prevent any conversation by the jurors with any court personnel which might be interpreted by someone as an opportunity to have contact with the jury in relation to a discussion of the facts of the case. You are not to discuss the case with anyone before you have reached your verdicts.

In the event you have a question, you will be called back into the courtroom for further instructions to resolve that question.

With respect to the verdict forms, I will give you verdict forms that the foreperson must sign. I will read you these [1615] verdict forms in just a moment.

In the event that you arrive at a verdict of guilty as to a particular Defendant and a particular count—well, I'll give, you more instructions on that.

All right. Let me talk to you about what we have presented here so far. Mary, do you have the indictment and the Note to the Court?

(Brief pause.)

All right. Ladies and gentlemen, this is the Note to the Court that I referred to earlier (indicating). It has on the top left-hand side the style of the case, that is, the name of the case, United States of America versus the Defendants who are named. On the right-hand side, it has the number of the case. And here is Note to the Court: "The jury has reached a unanimous verdict? Yes or no."

If you have reached unanimous verdicts, you will write in "yes" and have your foreperson sign. If you have a question, you will write in "no" and write your question right here and on the back of this form (indicating).

You can reach verdicts as to one or more of the Defendants and be unable to reach verdicts as to one or more of the Defendants or as to one or more of the counts. We hope that you can reach a verdict as to all Defendants on all counts, but the main thing is that you do what you think is--you're able to do under the circumstances.

[1616]

Now, there are separate verdict forms for each Defendant. I am not going to go through all of the verdict forms on each Defendant, but I am going to go through them all as they relate specifically to a particular Defendant, if my voice holds out.

The verdict form begins, this will—is the verdict as to Count One. And Count One, as I told you, the first—this is a conspiracy count, so the conspiracy count will begin on page 50. That's where there is a discussion of conspiracy. What is set out here is we have in the count—I mean, in the verdict form in Count One, and that is as to every Defendant. This is the same thing. I'm showing you here the case of United States versus McNab, but that also applies in the case against Mr. Blandford, Mr. Schoenwetter, and Ms. Huang.

This is—the count itself is Count One, but within Count One there are four separate conspiracies alleged, and I have set those out. 1.A., this is A (indicating), the charge that is made, and you'll find that in the indictment. The indictment will set out the—in Count One the charge that is made against these Defendants.

So, what is set out in Count 1.A. here, I have set out in the verdict form so you will have it and you will know what the charge is against that Defendant to allow you to find whether or not that Defendant is guilty or not guilty of that offense. And it says, it begins this way: "We, the jury, find the Defendant, David Henson McNab—" and that, his would be in the [1617] same as with each of the other, Robert Blandford, Abner Schoenwetter, and Diane Huang, I mean, Huang, that is, each one that you have to make this decision separately as to each Defendant. I've told you that. I just want to make it very clear that you must return a verdict as to each Defendant separately as to each count as to each charge against that Defendant.

So, although I'm referring to Mr. McNab as to Count One, it refers to all four of the Defendants. This is the charge

against Mr. McNab in Count 1.A., and you will find—you will look at this, you will look at the charge. You will be able to then determine under the evidence that is presented for you to determine whether or not they have proved that particular Defendant guilty of the charge in Count 1.A.

Then we come to 1.B., and that is the charge set out in the indictment in Count 1.B. It is the same thing: "We, the jury, find the Defendant," whichever Defendant—each Defendant is charged, whichever Defendant you are referring to, that Defendant guilty or not guilty.

If you find any one or all of the Defendants guilty, you will check "guilty" and scratch out "not guilty." Just scratch it out. If you find him not guilty, you will check "not guilty" and scratch out "guilty." The reason I ask you to do both is so there's no question in my mind when I get this form that the check may be someplace other than what you have [1618] intended. So, that goes as to all of the counts in—I mean, all of the sections of Count One.

1.B. is a separate conspiracy, 1.C. is a separate conspiracy, and each of those, including 1.D., is set out so that you must make a finding as to each Defendant as to each section of Count One; that is, Count 1.A., B., C., and D. You will return a verdict, a separate verdict for each Defendant as to each particular section in Count One.

Is there anyone who does not -- have any question about what I've just said about Count One? Anyone who doesn't understand what I hoped I said?

(No audible response.)

THE COURT: All right. We'll then go on to Count Two. Now, Mr. McNab is charged in Count Two, and it simply says: "We, the jury, find the Defendant, David Henson McNab, guilty/not guilty as to Count Two." Well, it says, "guilty/not guilty of the offense charged in Count Two of the second superseding indictment." If you find him not guilty,

you will check "not guilty" and strike out "guilty." If you find him guilty, you will check "guilty" and strike out "not guilty."

That goes on to Count Three. He's charged in Count Three, and you will follow these same instructions, each one. He's charged in Count Four, Count Five, Six, Seven, Eight, Nine, 10, 11, 12, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43. You must return a separate verdict of guilty or [1619] not guilty as it relates to count—as to Mr. McNab as to each of those counts. Each of those counts will be found in the indictment. You will find in here what is charged against the Defendant in that particular section of the indictment.

You will also find in the jury instructions the charge as it relates to those particular counts. So, you can—you will be able in looking at the verdict form, you will have to look at the superseding indictment and the instructions to render your verdict.

As to Mr. Blandford, as I told you, he is charged as to–as all Defendants in Count 1.A., B., C., and D., separate verdicts in each of those counts.

Mr. Blandford is charged in Count Two, Count Three, Four, Five, Six, Seven, Eight, Nine, 10, 11, 12, 13. And then there is a, a lesser included offense in Count 13, that if you will look at the instructions, you'll find that if the Government has not proved that he is guilty of the offense charged in Count 13, you will go to Count 13.A. to see whether or not the Government has proved that count, that portion of the count beyond a reasonable doubt.

He's also charged in Count 14, and also that is a lesser included offense; charged in Count 15, which is also a lesser included offense; Count 16, which is also a lesser included offense; and 17 as well, 18 as well. These are all—all include lesser included offenses. Count 19 is also a lesser

[1620] included offense; Count 20, a lesser included offense; Count 21, a lesser included offense; Count 22, a lesser included offense; Count 26, a lesser included offense; Count 27, a lesser included offense; Count 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 43.

You must return a verdict on all of the counts. When I say you must, that you can agree upon, on all of the counts. Or if you find a Defendant guilty of the charge, say, in Count 13, one that includes a lesser included offense, if you find him guilty of the offense of 13, you need not go into the lesser included offense. You do not, you do not make that second step. And I believe that's directed in the verdict form.

If you find him not guilty of the offense in 13 or in any of the others, the lesser included offense is included, you will then go to the lesser included offense section and look at the jury charge to see whether or not the Government has proved the claim after you look at the indictment to see what the particular charge or offense is.

All right. As to Mr. Schoenwetter, as I have said, he is also charged in Counts 1.A., B., C., and D. He is charged in Count Two—excuse me, that's incorrect. He is charged in Count Seven—let me go back again. He's charged in Count 1.A., B., C., and D. He is charged in Count Seven, Count Eight, Count Nine, Count 10, Count 11, and Count 12.

With Mr. Schoenwetter, as with the other Defendants, you [1621] must return a verdict if you can all agree as to each separate count. You must consider Mr. Schoenwetter, as I said about Mr. McNab and Mr. Blandford, separately, and you must return a verdict as to each one the same way. If you find him guilty, you check "guilty," strike out "not guilty." If you find him not guilty, you will check "not guilty" and strike out "guilty" as to each particular count.

All right. As to Ms. Huang—excuse me, Ms. Huang, she again, as all Defendants, are charged with violation of Counts 1.A., B., C., and D. She is also charged in Count 13 and the lesser included offense. She's charged in Count 14 and the lesser included offense. She's charged in Count 15 with the lesser included offense; the same in 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27. And she's also charged in Count 47. This is not a lesser included offense.

Again, with Ms. Huang as with the other Defendants, you must consider her separately. You must return a verdict as to each count on which you can all agree. If you find her guilty of a count such as 13 where there is a lesser included offense, you need not consider any lesser included offense where you are satisfied the Government has sustained its burden as to the offense charged.

If you find her not guilty of the offense charged and there is a lesser included offense, you must then go and make a determination as to the guilt or innocence of Ms. Huang as to [1622] the lesser included offense in each case where a lesser included offense is included.

All right. I've told you about the, about the indictment. I've pretty well given you the Note to the Court I have here, and you will have the jury charges to begin your deliberations.

Now, let me tell you some other things before we—before I ask you a question. When you begin your deliberations, when you go out to begin your deliberations, you will make your own decisions as to what time you want to come in in the morning, within reason. You can come in if you'd like at 8:30. There will be someone here. We'll have someone here if you'd like to be in at 8:30, nine o'clock, or 9:30. So, you are at liberty to choose the time, within an hour, as to how you'd like to come in.

In connection with taking a break in the morning, if you are here, you comeback for your deliberations and you are here in the morning, and you have deliberated for some length of time and you want to take a break, all you have to do is to knock on the door, tell the Marshal or Court Security Officer on the door that you want to take a break

If you take a break, let me instruct you this: You must all go out together. You cannot—none of you can remain in the juryroom while others are on a break. The reason for that is, as I have instructed you, you must all be present when you deliberate. All 12 of you must always be present during your [1623] deliberations. If three or four of you stay in, you have all the evidence in front of you there, it's just a great opportunity to talk about the case. So, you can't do that. So, I want everyone to go out when you have a break.

When you finish your break, tell the individual on the door how long you want to take, 10 minutes, 15 minutes, 20 minutes, and then return back to the Jury Assembly Room. When you've all assembled in the Jury Assembly Room, you'll be brought back up to continue your deliberations.

Now, if you're still here at noon and you desire to take—you want to take a break for lunch, you may choose when you want to take a break. If you want to go at 11:30, 12, 12:30, one o'clock, whatever time you all decide to go to lunch, you may go. You may take 45 minutes, an hour, an hour-and-a-half. Remember that the Court always takes lunch from 12 to 1:30 so that if you desire to take lunch and you go at 11:30, you come back at twelve o'clock and reach your verdicts in all of the cases, you'll recognize that you're going to have to wait until 1:30 before you can return your verdicts. So, keep that in mind in having your break or taking your lunch.

After lunch, when you come back from lunch, if you will just tell the Court Security Officer that you're coming back. If you go at, say, 12 and come back at one, tell her you'll be

back at one, go back into the Jury Assembly Room. When you come back, she will then bring you back up here to continue [1624] your deliberations.

In the afternoon, if you are here and you are deliberating in the afternoon and you want to take a break, all you have to do is knock on the door. Again, tell the Court Security Officer you want to go down and take a break. All of you leave, go downstairs, use the facilities down there. When you finish, go back into the Jury Assembly Room, and then you'll be called back up here as soon as all of you are together.

The Court will not necessarily greet you in the morning when you come in. As far as the Court is concerned, I may be involved in another matter. If I'm involved in another matter, it has nothing to do with your case. Understand that whatever the Court does will not be in connection with your case other than if all of the lawyers are here and you're brought back into the courtroom. That's the only time that there will be any other discussions.

Now, I may have discussions with the lawyers about a question that you may ask, and if we can resolve that question by writing something back to you, we'll send that note back rather than call you up.

The fact that an individual or a lawyer is not present when you come in or out does not mean that they're less interested in what you do. The mere fact that they're here or not here should not affect your verdict at all. Your verdict should be based on the evidence that you've heard in this case and [1625] nothing else, not whether there's someone here in the courtroom or not.

The lawyers, many of the lawyers have been here now for two weeks. They have other matters that they attend to. They have other judges making demands on their time. So, if they're not here, you'll understand that that is not a question

of a lack of interest; it's a question of requirements of other courts on the time of the attorneys.

And as far as the individuals are concerned, I don't know what their requirements are, but keep in mind that your obligation is to return a verdict on the basis of the evidence that has been presented.

I think I've tried to give you as fully as possible everything you need to do in making your deliberations and looking at the indictment. And as I said, the indictment is not evidence of guilt. It is simply given to you to show that's the charge made against the Defendant when you look at the particular verdict form as to each one of the Defendants that you're going to have to return a verdict on.

All right. Now, I'll ask you the question. It's 10 minutes of four. You have been listening to people talk all day long. I don't know whether you're willing to listen to each other talk at this time of the afternoon. You have, you have to return verdicts for, I'm not going to tell you the number because it may frighten you, but I don't think you're [1626] going to be able to do it this afternoon.

If you would like, I would excuse you at this time, let you come back Monday morning at a time that you, that you tell me you want to come back, and you can begin your deliberations at that time. When you come back, if you come back on Monday, everything will be in the juryroom. All of the exhibits will be placed in the juryroom, all of the charges—well, your charges will be back there, and the verdict form, note, and indictment will all be back there for you.

If you begin today, it will take a little time for us to get the exhibits back to you because we have quite a few, and you're not to begin your deliberations until you have the exhibits. So, it seems to me that makes it easier for you to make a decision.

Would you like to confer among yourselves to decide what you'd like to do, or have you already made up your minds? And if you want to leave at this time, if you will raise your hands, those—that takes care of it. We have a unanimous verdict at least on that.

If you will, I'm going to tell you one more time, don't read about the case. Don't talk about the case. Come back on Monday morning knowing just what you do about it right now, and then you can begin your deliberations fresh. Everything will be in there. If you'll go to the Jury Assembly Room, you will then be brought up to the juryroom to begin your deliberations.

[1627]

All right. I will—let me first talk to the lawyers and see if they have anything.

A JUROR: Judge, I have a question. Judge, I have a question. If Monday we don't reach a verdict by the end of Monday, let's say, four o'clock, would we be kept until we do reach a verdict?

THE COURT: No, no. You will be released whenever you choose to be released. If you want to leave at four o'clock, all you have to do is knock on the door, say we want to be released for the day, and you will be released for the day. You will come back the next morning at the time you choose, 8:30, nine, 9:30.

A JUROR: Okay. Thank you.

THE COURT: You all are the captain of your fate right now from this time on, and that will go on Tuesday, Wednesday, however long it takes you to reach your verdict. You will be allowed full time to reach your verdict. And when I charge you on that, I want you to understand it is for you to decide how long you need, not—what I say has got nothing to do with how long you need.

All right. Mary Frances, the lawyers. (Sidebar conference, on the record:)

THE COURT: All right, sir. Do you still want to talk?

MR. BRISKMAN: Yes, sir. I assume you're going to [1628] take exceptions now, Your Honor?

THE COURT: Oh, yeah, I'll take exceptions.

MR. BRISKMAN: Does the Government have any?

MR. COURTNEY: We don't need to do that at sidebar, do we?

MR. BRISKMAN: Well, yes, I do, because I don't want to leave them. Judge, you found a—you failed to charge the jury and prepare a verdict form on lesser included offense.

THE COURT: Did you charge on the lesser included counts?

LAW CLERK I understood that lesser included counts only fell through 13 through 28.

MS. COLBOURN: That's correct.

THE COURT: And they're all Florida? Oh, he's not charged?

MR. BRISKMAN: Lacey Act violations.

LAW CLERK: That's not my understanding.

THE COURT: I don't think so.

MR. COURTNEY: Isn't McNab charged with Lacey Act?

MS. COLBOURN: No, he's charged with 545—

THE COURT: All right. One at a time.

MS. COLBOURN: Count One is McNab, and it's conspiracy. Counts Six—sorry, Two through—

LAW CLERK: 12.

MS. COLBOURN: —12 are 545 counts, which include [1629] McNab.

MR. COURTNEY: What is 545?

MS. COLBOURN: Importation contrary to law.

MR. COURTNEY: That's not Lacey Act?

MS. COLBOURN: No, it's not Lacey Act. The Lacey Act counts start at 13 through 27, if I recall correctly.

MR. MURTHA: That's correct.

MS. COLBOURN: And Mr. Blandford and Ms. Huang.

THE COURT: Not you.

MR. COURTNEY: Okay.

MR. CLARK: Never mind.

LAW CLERK: The contrary to law, the importation contrary to law is the Lacey Act.

MR. COURTNEY: That's what I thought.

LAW CLERK: I think that's what you're thinking, but he's charged with 545.

MS. COLBOURN: Right.

MR. BRISKMAN: Illegal importation, not a Lacey Act. All right. Has the indictment been redacted as discussed? (Off the record discussion.)

THE COURT: I took out everything in the background, and I took out Counts—the obstruction counts and the forfeiture count.

MR. COURTNEY: Well, Judge, are we—after the jury leaves, are we going to give our exceptions to the charge?

[1630]

THE COURT: You already gave all your exceptions to the charge except as to whatever exceptions you may have to what I added.

MR. COURTNEY: Yes, sir. Well, I do, I still think on page 17, paragraph two, about the egg-bearing, we asked that the Court make it clear that McNab was not charged with that under the Lacey Act or importation or money laundering and smuggling counts, and that was not included. And I do think the jury could well be confused by all the verdict forms and things.

THE COURT: I don't disagree with you that they will be confused, but he's not charged in this, is he? Do you have any problem with this (indicating)?

MR. BRISKMAN: No. The preamble is—that language is cleared up, yes, sir.

MR. COURTNEY: The Government added a sentence to the egg—the charge about the Honduran. And of course, let the record reflect we disagree with all of that for the reasons discussed before, but as to number two, egg-bearing, we asked that the Government add things that this law will only be considered in connection with conspiracy.

THE COURT: I think it's in there.

MR. COURTNEY: It says that. We think it should also say not considered in connection with the importation, money laundering, and smuggling.

[1631]

THE COURT: All right. I'll give you an exception, Counsel. What else, Mr. Courtney?

MR. COURTNEY: Well, understanding that our objections to all the law, charges on Honduran law previously made, we'll incorporate those by reference. And we would also point out the Government has never introduced any evi-

dence as to the Honduran law. And at the beginning of the case, Your Honor told them they had to do that, and they never did. Told them twice that I have records of.

THE COURT: All right. You have that noted. All right. What do you—

MR. HUNTLEY: Your Honor, I've got two exceptions to the Court's charge.

THE COURT: That has been added; is that right?

MR. HUNTLEY: Yes, sir. I think it has, Judge.

THE COURT: All right. Well, I'm not taking any exceptions that you should have made them before when we started.

MR. HUNTLEY: Well, Judge, the first one is on page 18, and it's at the bottom of the page. I'll show it to the Court (indicating). That might make it easier. And I got it underlined that the Defendant was aware, and I object to this word "aware" instead of "knew," because that reduces the Government's burden of proof in the case.

THE COURT: All right. If it was in the original [1632] charge, I will deny, it. If it's in the—if it's something that I added, I'll deny it anyhow, and you will have an exception to it, though, under the second set of circumstances.

MR. HUNTLEY: Yes, sir.

THE COURT: What else?

MR. HUNTLEY: And Judge, on page—that's all, Judge.

THE COURT: Okay. Mr. Knizley?

MR. KNIZLEY: No exceptions, Your Honor.

THE COURT: Mr. Clark?

MR. CLARK: Yes, sir. Yes, sir. I've got to take Billy his coat back.

MR. KNIZLEY: Any exceptions, he's saying?

MR. CLARK: No, no. I made them before.

THE COURT: All right. I understand.

MR. KNIZLEY: Monday morning, Judge? I don't have no exceptions, Judge.

THE COURT: All right. What else?

MR. KNIZLEY: We're going to be striking a jury in here?

THE COURT: Say again?

MR. KNIZLEY: We're going to be around here striking juries?

THE COURT: Strike a jury? Yeah, that's right. You'll be in here.

MR. KNIZLEY: Just hang around here, Judge? What do [1633] you want us to do, just stay in the courthouse or what?

MR. CLARK: We're going to be striking juries.

MR. KNIZLEY: I know that, Clark.

(Off the record discussion.)

THE COURT: Everybody look at the exhibits. Everyone be sure because if the exhibit goes back and you say later it shouldn't have been there, it's too late. Tell me now. If you except to it now, I'll consider it. Otherwise, it stays in, that's right.

MR. CLARK: It's gone. Take them back, Mary. Take them back.

THE COURT: All right. You need to go over and look at them.

MR. CLARK: I am.

THE COURT: Not you. Anyone who wants to can go back and look at them. Yes, sir.

MR. MURTHA: Your Honor, the only thing the Government had is we wanted to make sure that the special verdict forms that we offered and were objected to by the Defendants are made a part of the record.

THE COURT: All right, sir. You may make it part of the record.

MR. CLARK: Yes, sir.

THE COURT: What else?

(Off the record discussion.)

[1634]

(In open court.)

THE COURT: All right. Just one minute. Yes, sir.

A JUROR: We have 15 jurors over here. We understand that only 12 can vote. We would like to know about the other three.

THE COURT: Well, we're going to tell you about that Monday morning when you get back.

A JUROR: Okay. Monday morning.

A JUROR: And we have decided to come in at nine.

THE COURT: Nine o'clock. Very good. If you will come back downstairs. The Court Security, you won't be here but—will you get somebody set up? We'll have someone down there to bring you back up. Very good. And the other three jurors we'll talk to Monday morning. Very good. We'll look for you Monday. Don't talk about the case. Good night.

(The jury was excused at 4:00 p.m. this date.)

THE COURT: Ms. Colbourn, could I see you just a minute over here?

(Sidebar conference, off the record with Ms. Colbourn.)

(Proceedings adjourned at 4:00 p.m. this date.)

APPENDIX O

07/01/99 THU 11:38 FAX 407 269 2558 NMFS ENFORCEMENT-TVILLE 0

02/04/99 THU [Illegible] KINKOS CORAL GAB 0

Feb 3, 1999

POSTED
By: 33 Date 12-25-00

TO WHOM IT MAY CONCERN:

Be advised that on Friday morning, the fifth of February (2/5/99) the vessel Caribbean Clipper will be arriving at the port of Mobile, Alabama, containing lobster tails from Honduras. This container consigned to Seamerica, a Florida corporation contains thousands of pounds (30000) of undersized (3&4oz) lobster tails, a violation of Honduran law, packed in bags. The product will be stored at Christian Salvensen in Mobile, Alabama.

It is a violation of Honduran law, to export product in bulk, our law requires that all product exported from our country should be packed in boxes. These actions take jobs from our people, hurt our fisheries, and our economy.

We ask that you look into this matter and proceed accordingly.

Government
Exhibit
26

APPENDIX P

CERTIFICATE OF ACCURACY

FREDERICO PEREZ-PINEDA BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

THAT I AM FLUENT IN BOTH THE ENGLISH AND SPANISH LANGUAGES.

I HEREBY CERTIFY THAT THE ATTACHED TRANSLATION INTO THE ENGLISH LANGUAGE OF THE DOCUMENTS ORIGINALLY IN THE SPANISH LANGUAGE, IS A TRUE AND COMPLETE TRANSLATION TO THE BEST OF MY KNOWLEDGE, ABILITY AND BELIEF.

/s/
FREDERICO PEREZ-PINEDA
INTERPRETER-TRANSLATOR
5354 Grishilde Drive
Mobile, Alabama 36693

SUBSCRIBED AND SWORN TO BEFORE ME

THIS 25 DAY OF SEPT., 2000

/s/
NOTARY PUBLIC, STATE AT LARGE

GENERAL LAW OFFICE OF THE REPUBLIC
REPUBLIC OF HONDURAS

LEGAL OPINION

The Undersigned, Attorney General emits legal opinion in relation to the inquiry based on the Article 80 of the Constitution of the Republic that was brought to this institution by the Attorney Maria Leticia Suazo de Guillén, registered in the Bar Association with number 5385, representing the society **CARIBEAN FISHERY CO S. DE R.L.** of the address of French Harbour, Roatan, Bay Islands. The purpose of this legal opinion is to determine A) If they are "laws" or they have the character of "laws"; B) If the resolution no. 003, issued the 31 of March of 1980 by the General Direction of Natural Resources; as well as the resolution no. 030-95 issued the 5 of December of 1995 by the titleholder of the mentioned entity (Today called Natural Resources and Environment) and the General Direction of Fishing and Aquiculture, are "regulations."

As following, I give answer to the inquiry in the following form:

A) Are they laws or have the character of "laws" the Resolutions no. 003 of the 31 of March of 1980 and no. 030-95 of the 5 of December of 1995?

The ability "to create, decree, interpret, reform, or revoke the laws" in Honduras corresponds solely to the National Congress, according to the Article 205, numeral 1 of the constitution of the Republic, for which the established legislative process must be fulfilled as it is written in Title V, Chapter II, Articles 213 to the 221 of the own Constitution.

Consequently, because the Resolutions were not issued by the National Congress and Because they did not fulfilled the process of formation, sanction, and promulgation of all laws, the Resolutions numbers 003 and 030-95 are not "laws" in

the constitutional and legal concept nor have character, effectiveness or force of laws, therefore, if they were applied like laws, the actions would be of absolute invalidity expressed constitutional dispositions have been violated.

B) Are "Regulations" the Resolutions numbers 003 issued the 31 of March of 1980 and 003-95 issued the 5 of December of 1995?

1) Resolution no. 003 of the 31 of March of 1980 was issued when the Code of Administrative Procedures of the 5 of April of 1930 was in operation. Under such Code, the Executive Power, the independent institutions and the municipalities issued as "Agreements" and never as "Resolutions" the regulations. These decisions are reserved to be taken in the administrative files in which the individuals take part.

   On the other hand the Agreements that the regulations contained, as an act of protocol, must be published in the official Newspaper "La Gaceta" in order to come into operation. This requirement was not met by the Resolution n. 003 of the 31 of March of 1980.

   In addition to Article 45 of the Fishing Law (Legislative Decree no. 154 of 19 of March of 1959), the fishing instruments, legal measures of the captured species, and seasons of prohibitions will be subjected to the regulations of the related law. Article 5 establishes that the Executive Power (President of the Republic), through the Secretary of Natural Resources, is the superior authority in the matter of fishing and its connections, therefore it can establish and dictate measures through regulations.

   In summary, the referred Resolution does not have a legal sense, because it does not represent any form of "Agreement", it was not published in the Gaceta, neither it was issued by the President of the Republic, through the Minister of Natural Resources. The document has, besides

absolute invalidity, absolute incompetence because an incompetent authority issued it.

2) Resolution no. 030-95 of the 5 of December of 1995 was issued when the General Law of the Public Administration was already in use, in whose Article 120 it is established that the decisions that are taken in order to conclude the procedure in which the individuals, who represent the interested party, had intervened "will adopt the form of Resolutions. In addition article 118 of the mentioned law disposes that "they will be issued by an Agreement 1) . . . . 2) The acts of a general character that could be dictated when exercising the regulative power".

   And even though Resolution no. 030-95 was unnecessarily published in the Official Newspaper La Gaceta, it lacks the requirement of the form of the Agreement as it must have been issued if the intention of the authority was to dictate acts of general character in exercising the regulative power, which, does not correspond to the titleholder of the Secretary of Natural Resources representing the General Direction of Fishing and Aquiculture but to the President of the Republic through the Titleholder of this Secretary, according to what is stipulated in Articles 5 and 45 of the Fishing Law, reason why in the assumption to consider regulative norms, it would lack not only form but efficiency of the authorities that issued them and therefore invalidity of these regulations is produced.

Tegucigalpa, M.D.C., 24 of July, 2000

Seal and Signature
Attorney Hector Ramon Trochez
General Attorney of the Republic

APPENDIX Q

IN THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15147-33

UNITED STATES OF AMERICA

Plaintiff/Appellee,

Vs.

DAVID HENSON McNAB, ET AL.,

Defendant/Appellant

DECLARATION BY SERGIO ZAVALA LEIVA ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS

1. I am the Attorney General of the Republic of Honduras and, as such, my responsibilities include the enforcement and protection of the Law of Honduras. According to Article 228 of the Constitution of the Republic, I am the Legal Representative of the State of Honduras and, as such, empowered to issue this opinion ["dictamen"].

2. The Government of the Republic of Honduras is not a common law ["jurisdicción consuetudinaria"] country. Honduras is a constitutional Republic, whose codified and written continental legal system comprises numerous guarantees and guaranteed rights that protect due process.

According to Article 315 of the Constitution of the Republic of Honduras, the Constitution is the Supreme Law of the Republic.

The legal structure of Honduras is as follows: the Constitution of the Republic, International Treaties ratified by Honduras, the Laws (Statutes), the Regulations, Administrative Jurisprudence and the General Principles of Law[1].

The Constitution of the Republic is decreed and sanctioned by the National Constituent Assembly. The National Congress has the sole prerogative for ratifying international treaties, as well as creating, decreeing, interpreting and revoking laws (statutes). The Constitution also confers upon the officeholder of the Executive Branch the power to issue regulations, which, in turn, acquire force of law.

Regulations (which must be issued in the form of *Acuerdos*[2]) [Translator's Note: Since *Acuerdo* can be rendered "agreement," "decision" and "accord" and in this context defies a one-word translation into English, hereinafter it will be left in Spanish in italics] are general rules of conduct applicable to all those who may be affected thereby.

The Constitution empowers the President of the Republic to issue Regulations (Article 245, Item 11), and he is the only person expressly empowered by the law to do so[3]. The Con-

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[1] Article 7 of the General Law of Public Administration.

[2] Article 118, Item 2, of the General Law of Public Administration.

[3] The Constitution sets forth that the powers of the functionaries are "by express text" and not tacit, i.e., that it requires the actions of the functionaries to have been previously authorized in a law in order for them to be able to carry them out. *"(Article 321—The servants of the State have only*

[Footnote continued on next page]

stitution also sets forth that, in order for the regulations to have legal effect, they must be authorized by the appropriate Secretaries of State (Article 248).

Both the Laws and the Regulations become effective when they have been validly issued and published in *La Gaceta*, which is the equivalent in Honduras to the *Federal Register* of the United States.

Other actions taken by the Administration in Honduras are those called "Resolutions," which are actions to enforce the laws and regulations; accordingly, resolutions are administrative or judicial decisions that are designed to conclude a procedure or dispute in which a concerned party takes action that is within the jurisdiction of the government office that issues it or else in the jurisdiction of the court. Judicial resolutions are also called judgments.

The judicial system of Honduras includes the Courts of First Instance of Administrative Affairs, which are responsible for resolving disputes related to administrative matters. A decision by a Court of Administrative Affairs can be appealed to the Court of Appeals of Administrative Affairs.

3. There are cases in which the meaning and the interpretation of the laws of Honduras become important for other countries and foreign states. An example is the case that concerns us, in which the enforcement of the so-called "Lacey Act" makes a person or an entity either civilly or criminally liable under the laws of the United States if it is shown that the party has violated the laws of Honduras.

[Footnote continued from previous page]

those powers that are expressly conferred upon them by the law. Any act performed by them outside of the law is null and void and entails liability)."

4. In Honduras, to determine whether a person or an entity has violated a certain Law, not only the allegedly violated law must be considered, but also the existing legal framework together with the rights and guarantees set forth by the Law. Likewise, there are General Principles of Law that must be considered, since they are an integral part of the laws and that are the product of the evolution of Law in Honduras and which must be considered. For this reason, the Constitution in Article 90 thereof states that: *"No one can be judged except by a judge or court of competent jurisdiction with the formalities, laws and guarantees set forth by the Law."* (Emphasis added). This is a manifestation of the codified and written continental legal system that governs in Honduras.

In our system, ignoring the legal context, formalities, existing legal rights and guarantees would be a violation of the guarantee of judicial protection, which grants the accused the right to make use of any effective resource that protects him against acts that violate his fundamental rights as recognized in the Constitution, in International Treaties and in the Law and, therefore, a serious violation of due process.

5. The Constitution sets forth that any person or entity is entitled to submit petitions to the authorities whether for reasons of private or general interest, as well as obtain a prompt reply by the legal deadline (Article 80). To do so, the Law of Administrative Procedure sets forth a procedure to be followed within the administration, designed to guarantee, to the extent possible, that the final product is, legally correct.

The procedure in the case of a petition of an interested party to the administration is initiated by means of a brief addressed to the body empowered to resolve the matter. The body with competent jurisdiction to decide [the issue] will request the mandatory and optional reports and opinions ["dictámenes"] from the consulting bodies. In all cases, it is necessary for an opinion ["dictamen"] of the Legal Depart-

ment to be requested before issuing the resolution. The procedure initiated with the petition will end with the Resolution, in which all of the issues posed by the concerned parties and any resulting from the case will be decided.[4]

Based on the principle that the powers of the functionaries are "by express text,"[5] only those functionaries upon whom the laws confer powers to issue resolutions can validly issue documents that contain the opinion ["opinion"] of the body they represent.

The Constitution of the Republic states that the Executive Power is exercised by the President of the Republic (Article 235). The President of the Republic is responsible for the supreme direction and coordination of the Public Administration (Article 11, General Law of Public Administration) and has the power to resolve matters (Article 245, Item 11 of the Constitution).

The Secretaries of State (also known as "Ministers") are the direct collaborators of the President of the Republic in the corresponding Office (Article 247 of the Constitution, Article 33 of the General Law of Public Administration). The Ministers are empowered to issue resolutions in matters falling under their jurisdiction[6].

The Under Secretaries of State (also known as Vice-Ministers) are the direct collaborators of the Secretary of State and the ones who may assume the functions of a Secre-

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[4] Articles 61, 72, 83 of the General Law of Administrative Procedure.

[5] *See* footnote no. 3.

[6] Article 36, Item 8, of the General Law of Public Administration.

tary of State by Law in those cases provided for. They also decide in those matters delegated to them by the Minister.[7]

The General Directorates, which are departments designed for the execution of specific programs and projects, are also part of the Secretariats of State. The person in charge of them also has the power to rule on matters falling under his jurisdiction.[8]

Another organ of the Secretariat of State, which, unfortunately, to the detriment of the accused, has had great significance in the case that concerns us because its involvement has been considered "critical" in the decisions made by the Court of Alabama is the General Secretariat, which is nothing more than the instrument of communication for the Secretariat of State. Its officeholders have certification duties.

The functions of the General Secretariat, pursuant to Articles 27 and 28 of the Regulations of the Organization, Operation and Jurisdiction of the Executive Branch, are limited to the following: receiving requests, and petitions and registering them appropriately; seeing that the matters are processed by the established deadlines; keeping a record of the decrees and *acuerdos* issued in relevant matters; keeping a record of the official correspondence and sending it to the appropriate party; keeping the General Archive of the Office; authorizing the signature of the Secretary of State or the Under Secretary and those measures, decisions or resolutions issued by them; notifying the concerned parties of the provisions or resolutions; transmitting to the concerned parties the

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[7] Article 36, Item 19, of the General Law of Public Administration.

[8] Article 30 of the Regulations of the Organization, Operation and Jurisdiction of the Executive Branch issued to enforce the General Law of Public Administration.

decisions issued on relevant matters; coordinating and supervising legal services, i.e., assigning the case files to the different legal advisors and exercising oversight to see that the steps are carried out in order. It is also responsible for institutional communication and management services of external cooperation.

The Secretary General is not authorized to resolve any type of process, except in those matters expressly delegated to him by the Minister through a Delegation *Acuerdo* that meets all of the requirements set forth by the Law and it is required that his resolution be part of a pre-existing procedure.

As stated in the powers of the aforementioned General Secretariat, its officeholder does not issue legal opinions ["opiniones o dictámenes"] at any time, either within the internal proceedings of the Ministry or much less so for outside the Institution. This would violate the Honduran legal structure.

The opinions ["dictámenes u opiniones"] issued by the advisory organs of the Ministry, such as the legal and technical departments, are solely for internal use and their purpose is to inform the officeholder of the body of the administration on the matter it is going to resolve. They have no outward legal effects, because these advisory organs cannot issue opinions ["dictámenes u opiniones"] outside of the internal proceedings that so require them. To do so would be totally irregular and illegal under the laws of Honduras.

The fact that functionaries without competent jurisdiction have participated in an irregular manner in this criminal process is something so serious for the Law of Honduras that even the Secretary of State for Agriculture and Livestock has had to intervene to disqualify this participation, which has been defined by the Human Rights Commissioner, in his report, as a violation of the accused's Human Rights.

6. Unfortunately, most of the documents that were used by the Court to inform itself about the proper interpretation of the Law of Honduras, which documents were furnished by the Department of Justice of the United States[9], present, among other things, some of the following problems: 1) They come from functionaries without powers to issue them;[10] 2) They failed to follow the procedure set forth in the laws of Honduras; and 3) They were misrepresented before the Court of the United States, since, under the laws of Honduras, they do not have legal effect because they do not express the will of the State.

In Honduras, this type of violations of the law is seen as a violation of Due Process. Had the appropriate procedures been followed, the most likely thing is that the Court would have seen the facts with greater clarity and would not have had the difficulties that gave rise to an erroneous interpretation of the Law of Honduras, which would have been shown that the violations alleged in the case did not exist.

7. The basis for the allegations against the accused is that they have violated the following: (1) Resolution 030-95, in relation to the limit on the size of the lobsters; (2) *Acuerdo*

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[9] Some documents presented to the court were obtained from the Office of the Public Prosecutor by the Economic Advisor of the Embassy of the United States in Honduras which confuses even more the "procedure" that the Department of Justice of the United States followed to obtain its evidence.

[10] Examples: a) Secretary General and some legal advisors of the Ministry of Agriculture and Livestock; b) Documents of the Office of the Public Prosecutor in charge "of the investigation of crimes and the exercise of public criminal action" (Law of the Office of the Public Prosecutor) when a violation of the Fisheries Law is not subject to criminal prosecution since it is merely administrative.

0008-93; with regard to rules of hygiene for seafood products, and (3) Article 70, Item 3 of the Fisheries Law of 1959, in relation to aquatic species with eggs.

8. **Resolution 030-95**. This Resolution, which, inasmuch as its contents are no more than Regulations issued in an incorrect form,[11] was declared null and void *ab initio* and without legal force or effect, due to the fact that it was not issued according to the Constitution and the Laws of Honduras. For this reason, it cannot nor should be the grounds for determining the existence of a violation of the Law of Honduras in this case.

The nullity *ab initio* of Resolution 030-95, among others, was determined in the judgment of the Judge of Administrative Affairs (May 23, 2001). This decision was confirmed by the Court of Appeals of Administrative Affairs (October 11, 2001).[12] Both judgments of the Courts of Administrative Af-

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[11] Because of its regulatory content, it should have been issued by in the form of an *Acuerdo* and not as a Resolution, since it is not a decision that settles any dispute or procedure.

[12] It should be mentioned that the reasons set forth by the Department of Justice of United States for disagreeing with the decision of the Court of Administrative Affairs (Govt. Br. page 31, footnote 12) denote a lack of clarity they have with regard to the Law of Honduras and show the injustice committed. (1) The Courts of Administrative Affairs have at no time said that the President can issue administrative *resolutions*. As we have mentioned, there are several functionaries with the power to rule on matters in their jurisdiction within the administration. The President has the sole power to issue regulations, i.e., general rules of conduct. (2) The Department of Justice of the United States apparently still does not understand the difference between a Resolution and Regulations... Resolutions must be limited to conclude (resolve) a procedure in which a private party takes action as a

[Footnote continued on next page]

fairs have been recognized by the Secretary of State in the Offices of Agriculture and Livestock as being of binding compliance and final, who also recognizes that Resolution 030-95 is null and void *ab initio* and that it is not a representation of the Law of Honduras.

The Court of Administrative Affairs included language in its judgment stating that the annulment of Resolution 030-95 (and other resolutions) was "only for purposes of its annulment and future inapplicability: This Resolution does not confer rights for claims." This language has led the Department of Justice of United States to assert that the decisions of the Courts of Administrative Affairs have no impact on the prosecution pending in this case. The position of the Department of Justice in this regard is incorrect, since these decisions are of binding compliance.

The judgments of the Courts of Administrative Law clearly set forth that Resolution 030-95 is null and void, but they also clearly state that it can no longer be enforced as of the date or which these decisions become final. This is explained in the following way: 1) **Annulment**: That the assumption of the validity of Resolution 030-95 ceased to exist and that, therefore, it is officially nonexistent for any persons who could have been affected by it; and 2) **Future Inappli-**

[Footnote continued from previous page]

concerned party (Article 20, General Law of Public Administration) and the Regulations are the acts of a general nature or general rules of conduct applicable to all those who may be affected thereby. The Resolutions annulled by the Courts of Administrative Law were general rules of conduct and not decisions that resolved a given conflict; therefore, they were treated by these courts as *Regulations* and not as *Resolutions*, also clarifying the violation of the Law by the existing defect in form by calling them Resolutions and not *Acuerdos* as was appropriate.

cability: That Resolution 030-95 can no longer be applied in any Administrative or Judicial proceeding, including all of those proceedings awaiting a final resolution; No individual or entity can be sanctioned for failing to comply with it, even when it is shown that the violation occurred before being declared null and void, because the resolution is null and void.

It is important to stress the clarity with which the Court of Appeals of Administrative Affairs sets forth the nullity *ab initio* of the resolutions, by stating that if the regulations are not issued by the President of the Republic and authorized by the Minister of the [appropriate] Sector, they would never have had legal effect.

The reason that the laws of Honduras and, in particular, the Court for Administrative Appeals, with its specific language in its judgment, only set forth its future inapplicability is to guarantee the legal security of the State, protecting it from any damages and losses that could have been caused by the enforcement of an act that is null and void as a matter of law. This means that final cases in which the annulled rules were enforced while they were still assumed to be valid cannot be reopened.[13]

The fact that certain situations are guaranteed for the protection of the State and society has no effect on the type of nullity. This is explained in the following manner: The Resolutions were annulled *ab initio*, i.e., it is considered that the Resolutions were never laws of Honduras but the effects

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[13] An exception to this rule would be in the criminal context: in criminal trials in which a final condemnatory judgment is imposed based on the application of an administrative act that is null and void as a matter of law, the constitutional guarantee of the retroactivity of the law to the benefit of the delinquent is applicable (Article 96).

of the decision are *ex tunc*, i.e., it does not affect final administrative cases, only those that are still pending at the time of the judgment.

It should be added that, under the laws of Honduras,[14] if an attempt had been made to sanction the accused for failure to comply with Resolution 030-95, the defendant could have made use of the resources and guarantees that the Law conferred upon him, claiming nullity as a matter of law of the act during the trial. If the Court were in agreement with this and declared the Resolution to be null and void, the defendant would not have been sanctioned, even when there existed an assumption of validity of the Resolution until it was declared null and void.

The judgments of the Courts of Administrative Affairs have a decisive impact in the prosecution pending in this case for the following reasons: 1) The nullity of Resolution 030-95 is *ab initio*, i.e., it was never the Law of Honduras; 2) the judgment of the Courts of Administrative Affairs prevents any court from continuing to enforce 030-95 in any pending case awaiting final resolution, such as in the case that concerns us; 3) the judgment of the Courts of Administrative Affairs confirms that, if the accused had been put on trial in Honduras for violating Resolution 030-95, he would have been able to demonstrate his innocence, since this Resolution was null and void.

9. ***Acuerdo* 0008-93.** The purpose of the Regulations (equivalent to an Administrative Regulation of the United States) contained in *Acuerdo* 0008-93 was to state the hygienic and sanitary inspection rules for seafood products. It was issued to implement Decree No. 40 (which is equivalent

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[14] Law of the Jurisdiction of Administrative Affairs (Article 30), among others.

to a "statute" of the United States), dated May 16, 1973. This Decree was expressly repealed by Article 42 of Decree No. 157-94, which went into effect on January 13, 1995, and, therefore, it had no validity during the time in which the lobsters involved in this case were caught.

The repeal of Decree No. 40 has the effect, under Honduran Law, of repealing all of those regulations promulgated under this Decree, including *Acuerdo* 0008-93. This longstanding principle of law, both in Honduras and in most legal systems, has been precisely reiterated by the National Congress in its interpretation of Article 43 of the Civil Code, issued by means of Decree 198-2001, which, in its relevant part, states literally:

> ". . . the total or partial express repeal of a law leaves without legal value or effect the general regulations and the specific regulations in toto, or in that part referring to the reformed article or articles when the reform is partial, that the Executive Branch, through the Secretariat of State, has issued to implement the provisions of the repealed Law . . . ."

In Honduras, the interpretive laws are part of the interpreted laws. Thus, they are considered applicable from the date of the interpreted laws.

Therefore, the Regulation contained in *Acuerdo* 0008-93 had no legal validity or force during the relevant period of time in this case.

10. **Article 70 of the Fisheries Law**: Similarly, Article 70, Item 3, as it appeared in Decree 157 of the Fisheries Law of 1959, which has been considered as a Law of Honduras that has been violated, in this case was specifically repealed by Decree 245-2000, which went into effect on February 5, 2001, and which replaced Article 70 in its entirety, with a new and amended Article 70. Therefore, the original Article,

under Honduran Law, ceased to be valid and to have legal effect when its reform went into effect. The new Article 70, adopted by Decree 245-2000, contains no prohibition related to the eggs of aquatic species.

The same Secretary of State in the Offices of Agriculture and Livestock, as the superior authority in this matter, clearly states in his Resolution that the reform contained in Decree 245-2000 left invalid and without legal effect the previous provision contained in Article 70, Item 3, of the Fisheries Law of 1959, and that, under Article 96 of the Constitution of Honduras, the repeal of Article 70, Item 3, has retroactive effect to the benefit of those accused in the pending criminal charges.

It should be stressed that Article 70, Item 3, of the Fisheries Law of 1959 was duly interpreted by the corresponding authorities interpreted it[15] in the following manner: This article prohibited the destruction or collection of the eggs or the spawn of the aquatic species but not the destruction or collection of the egg-bearing species.

This interpretation has logical support, since it cannot be thought that this article prohibited the collection of all the egg-bearing aquatic species, due to the fact that this would include species such as shrimp and fish, among others, which is not only unnecessary but commercially impossible to comply with and, in addition, would do tremendous harm to the economy of the country.

Therefore, Article 70, Item 3, of the Fisheries Law ceased to have legal validity when it was repealed, which, when applied retroactively, causes the related article to be unenforce-

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[15] As substantiated in the Statement of the General Directorate of Fisheries and Aquaculture.

able in the case; in addition, it never penalized the conduct supposedly imputed to the accused.

11. **Reference to the involvement of the "amici curiae"**: The concept of the *amici curiae* is a novel and revolutionary element in international law by empowering or authorizing any concerned person to submit his written opinion on items submitted for discussion; in fact, in the Inter-American system, this concept has had a notable development with the involvement of even non-governmental organizations in the hearings held by the Inter-American Court of Human Rights.

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SERGIO ZAVALA LEIVA

Attorney General of the Republic

[Rubber stamp: "OFFICE OF THE ATTORNEY GENERAL OF THE REPUBLIC. {coat-of-arms} ATTORNEY. HONDURAS, CENTRAL AMERICA".]

Approved [illegible signature]
AUTHENTICATION SECTION
[illegible revenue stamp with illegible cancellation]
THIS OFFICE IS NOT LIABLE FOR THE CONTENTS OF THIS DOCUMENT

SECRETARIAT OF STATE IN THE OFFICE OF FOREIGN RELATIONS

No. 11,981

The undersigned Secretary General of the Secretariat of State in the Duly Authorized Office of Foreign Affairs.

CERTIFIES: That the preceding signature is authentic and reads: SERGIO ZAVALA LEIVA.

Affixed in his capacity as: ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS.

Tegucigalpa, M. D. C., May 13, 2002

[illegible signature]
ELANA HILSACA DE GARCÍA
Assistant to the Secretary General

[Rubber Stamp: "SECRETARIAT OF FOREIGN RELATIONS AUTHENTICATION SECTION. Tegucigalpa, M. D. C., HONDURAS, CENTRAL AMERICA".]

[Stamped paper with seals on upper left-hand corner and upper right-hand corner.]

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CERTIFICATE OF AUTHENTICITY

The undersigned Notary, domiciled in Tegucigalpa, Municipality of the Central District, and registered under No. 0286 in the Bar Association of Honduras, CERTIFIES: That the following articles mentioned in the preceding document, a) Constitution of the Republic: 80, 90, 96, 235, 245, 247, 248, 315, 321, b) General Law of Public Administration: 7, 11, 33, 36, 118, 120; c) Law of Administrative Procedures: 61, 72, 83; d) Regulations of the Organization, Operation and Jurisdiction of the Executive Branch: 27, 28, 30; e) Law of the Jurisdiction of Administrative Affairs: 30; are **AUTHENTIC**, according to a check and comparison that I did of their originals.

CERTIFIED BY ME.

The preceding pursuant to Decree Law No. 1059 of July 15, 1980.

Tegucigalpa, M.D.C. May 13, 2002

[two illegible signatures]

[illegible revenue stamp with two illegible cancellations] **Tegucigalpa, M.D.C., May 13, 2002**

LIST OF ARTICLES MENTIONED IN THE DOCUMENT

Constitution of the Republic: 80, 90, 96, 235, 247, 248, 315, 321.

General Law of Public Administration: 7, 11, 33, 36, 118, 120.

Administrative Procedure Law: 61, 72, 83.

Regulations of Organization, Operation and Jurisdiction of the Executive Branch: 27, 28, 30.

Law of the Jurisdiction of Administrative Affairs: 30.

CONSTITUTION OF THE REPUBLIC AND ITS REFORMS

Article 80. Any person or association of persons is entitled to submit petitions to the authorities for reasons either of private or general interest and to obtain a prompt reply by the legal deadline.

Article 90. No one may be judged except by a judge or court of competent jurisdiction with the formalities, rights and Guarantees set forth in the law.

The military code of laws is recognized for crimes and faults of a military nature. In no case may the military courts extend their jurisdiction to persons who are not in active service in the Armed Forces.

* Interpreted by means of Decree Number 58-93, published in *La Gaceta*, No. 27,059 of June 2, 1993.

Article 96. The Law has no retroactive effect except in criminal matters, whenever the new law favors the criminal or defendant.

Article 235. The Executive Branch is exercised in representation and to the benefit of the people by the President of the Republic.

Article 245. The President of the Republic has the general administration of the State; the following are his powers:

1. to comply with and enforce the Constitution, treaties and conventions, laws and other legal provisions;
2. to direct the general policy of the State and represent it;
3. to maintain unscathed the independence and honor of the Republic and the integrity and inviolability of the national territory;
4. to maintain the internal peace and security of the Republic and repel any outside attack or aggression;

5. to freely appoint and remove the Secretaries and Under Secretaries of State and other functionaries and employees whose appointment is not assigned to other authorities;

6. to call the National Congress to special sessions by means of the Standing Committee or propose to it the extension of the regular sessions;

7. to restrict or suspend the exercise of rights, in agreement with the Council of Ministers, subject to what is set forth in this Constitution;

8. to address messages to the National Congress at any time and obligatorily personally and in writing at the time every regular legislature is installed;

9. to participate in the creation of the laws, submitting bills to the National Congress by means of the Secretaries of State;

10. to give the Legislative and Judicial Branches and the National Electoral Court any assistance and forces they need to enforce their resolutions;

11. to issue ["emitir"] *acuerdos* and decrees and issue ["expedir"] regulations and resolutions in accordance with the Law;

12. to direct international policy and relations.

13. to sign treaties and conventions, ratify, subject to prior approval by the National Congress, International Treaties of a political and military nature and those related to the national territory, sovereignty and concessions, those involving financial obligations for the Public Treasury or those requiring the amendment or repeal of any constitutional or legal provision and those requiring legislative measures for their implementation;

14. to appoint the heads of diplomatic and consular missions according to any Foreign Service Law issued, which persons who must be Honduran in birth, except in the case of an honorary position or joint representations of Honduras with other states;

15. to receive the heads of diplomatic missions and the representatives of international organizations, to issue to and remove from the Consuls of other States the Exequatur [Translator's Note: per Black's: *Written official recognition and authorization of a consular officer, issued by the government to which he is accredited*];

16. to exercise control as Chief of the Armed Forces in his capacity of General Commander and to adopt the necessary measures to defend the Republic;

17. to declare war and make peace when the National Congress is in recess, which must be called to meeting immediately.

18. to exercise oversight, in general, over the official conduct of the public functionaries and employees for the security and the prestige of the Government and the State;

19. to administer the public treasury;

20. to dictate special measures in economic and financial matters, when so required by then national interest, with the obligation of giving an account to the National Congress;

21. to negotiate loans and execute the contracting thereof, subject to prior approval from the National Congress, whenever required;

22. to draw up the National Development Plan, discuss it in the Council of Ministers, submit it for approval by the National Congress, direct it and implement it:

23. to regulate the tariff rates in accordance with the Law;

24. to pardon and commute sentences under the Law;

25. to award decorations [medals] under the Law;

26. to cause the revenue of the State to be collected and regulate its investment under the law;

27. to publish on a quarterly basis the Statement of Income and Expenses of the Public Revenue;

28. to organize, direct, orient and foster public education, eradicate illiteracy, disseminate and improve technical education,

29. to adopt measures of promotion, prevention, recovery and rehabilitation of the health of the inhabitants;

30. to direct the economic and financial policy of the State;

31. to exercise oversight and control of the banking, insurance and financial institutions by means of the National Banking and Insurance Commission, the composition and operation of which shall be governed under a special law, and appoint the Presidents and Vice-Presidents of the Banks of the State, under the Law;

32. to issue all of the measures and provisions within his scope to promote the rapid accomplishment of Agrarian Reform and the development of production and productivity in the agricultural sector;

33. to sanction, veto, promulgate and publish any laws passed by the National Congress;

34. to direct and support the Economic and Social Integration policy, both domestically and internationally, the purpose of which is to improve the living conditions of the people of Honduras;

35. to create, maintain and eliminate public services and take whatever measures as may be necessary for their proper operation;

36. to confer military grades from Second Lieutenant to Captain, inclusive;

37. to see that the Army is apolitical, essentially professional and obedient;*

    ** Amended by means of Decree Number 10-84 as published in "La Gaceta", no. 24,262, of March 9, 1984, the text of which appears in an attachment to this Constitution.*

38. to grant and cancel natural naturalization papers, authorized by the Executive Branch, under the Law;

39. to grant pensions, gratifications and bonuses under the Law;

40. to grant the status of a juristic person to civil associations under the Law;

41. to ensure harmony between capital and labor;

42. to review and set the minimum wage in accordance with the Law;

43. to permit or deny, subject to prior authorization by the National Congress, passage through Honduran territory of troops of another country;

44. to allow, subject to prior authorization of the National Congress, the departure of Honduran troops to serve in foreign territory, under international treaties and conventions, for peace-keeping operations; and

45. the other powers conferred upon him by the Constitution and the laws.

Article 247. The Secretaries of State are collaborators of the President of the Republic in the orientation, coordination, direction and supervision of the bodies and entities of the national public administration in the area of their competence.

Article 248. The decrees, regulations, *acuerdos*, orders and measures of the President of the Republic must be authorized by the Secretaries of State in their respective sectors or by the Under Secretaries, as applicable. Without these requirements it will not have legal effect.

The Secretaries of State and the Under Secretaries shall be jointly and severally accountable with the President of the Republic for any actions authorized by them.

The ministers present shall be accountable for the resolutions adopted in meetings of the Council of Ministers, unless they have given the grounds for their negative vote.

Article 315. In cases of incompatibility between a rule of the Constitution and an ordinary legal rule, the Judge shall enforce the former.

Likewise, he shall enforce the legal rule over any other subsidiary rule.

Article 321. The servants of the State only have those powers expressly conferred upon them by the law. Any act performed by them outside the Law is null and void and involves accountability.

GENERAL LAW OF PUBLIC ADMINISTRATION

ARTICLE 7. The actions of the Public Administration must conform to the following legal hierarchy:
(a) The Constitution of the Republic;
(b) The International Treaties ratified by Honduras;
(c) This Law;
(d) The Special Administrative Laws;
(e) The Special and General Laws in effect in the Republic;
(f) Any Regulations issued for the enforcement of the Laws;,
(g) Other General or Special Regulations;
(h) Administrative Case Law and
(i) The General Principles of Public Law.

ARTICLE 11. The President of the Republic is responsible for the supreme direction and coordination of the centralized and decentralized Public Administration. The President of the Republic in the exercise of his duties may act for the Council of Ministers.

ARTICLE 33. *The Secretaries of State are collaborators of the President of the Republic in the Office of Public Affairs and in the orientation, coordination, direction and supervision of the bodies of the centralized Public Administration and the coordination of the dispersed entities and bodies or the decentralized institutions in the areas in which they have competent jurisdiction*

The Secretaries of State or whoever replaces them under the Law are responsible for countersigning the signature of the President of the Republic in sanctioning the Laws and hearing and resolving the matters of their respective sectors. However, the Secretaries of State may delegate to the functionaries, referred to by Article 30 of this Law, any of their powers, including those that have been delegated by the President of the Republic, as well as the resolution of instances of administrative recourse and those powers that,

pursuant to a provision of the Law or its regulations, must be exercised by them.

ARTICLE 36. The following are common powers and duties of the Secretaries of State:

1. to orient, direct, coordinate, supervise and monitor the activities of their respective offices, without affecting any powers that the Constitution and the Laws confer upon other bodies;

2. to comply with and enforce the provisions of the Constitution of the Republic, the Laws and general and special regulations and those orders legally issued by the President of the Republic to whom they must give an accounting of their actions;

3. to inform in writing the President of the Republic, with a copy for the Secretary of State in the Office of Foreign Relations of any official actions they perform outside the country;

4. to attend meetings of the Council of Ministers;

5. to draw up, with regard to matters of their competent jurisdiction, Bills, regulations and other acts of the President of the Republic;

6. to issue the regulations of internal organization of their respective offices;

7. to transmit to the National Congress the Bills approved by the Council of Ministers and that deal with matters of their competent jurisdiction;

8. to issue *acuerdos* and resolutions in those matters of their competent jurisdiction and those delegated to them by the President of the Republic and ensure their implementation. The signature of the Secretaries of State in these cases shall be authorized by the respective *Secretaries General*;

9. to develop under this Law and the respective special rules the Draft Budget of the [TEXT ENDS]

ARTICLE 118. The following shall be issued by an *Acuerdo*:

1. Any decisions of a private nature made outside of the procedures in which private parties participate as concerned parties; and
2. Acts of a general nature issued in the exercise of the regulatory power.

The grounds for these acts shall be preceded by the designation of the authority issuing them and followed by the formula "*ACUERDA*".

ARTICLE 120. Those decisions made to conclude the procedure in which the private parties are involved as concerned parties shall adopt the form of Resolutions.

In the Resolutions, the body issuing them and their date shall be indicated and, after the grounds therefor, they shall bear the formula "*RESUELVE.*"

LAW OF ADMINISTRATIVE PROCEDURE

ARTICLE 61. If it is initiated at the urging of a concerned party, in the brief submitted by the party, the following shall be stated:

a) A summary indicating its content or the procedure in question.
b) The indication of the body to which it is addressed;
c) The full name, marital status, occupation or job and domicile of the petitioner or his representative, in which case, he must submit the document that authenticates his representation;
ch) The facts and reasons on which it is based and the clear expression of what is petitioned for; and
d) Place, date and signature or fingerprint, when the party does not know how to sign [his name].

ARTICLE 72. The agency having competent jurisdiction to decide shall request the mandatory and optional reports and opinions ["dictámenes"] from the advisory bodies, which have to be submitted, in the absence of a legal provision, by the maximum deadline of fifteen days to be reckoned from the date on which they receive the petition.

In any case, an opinion ["dictamen"] from the respective Legal Department must be requested before issuing a resolution, whenever this resolution is to affect subjective rights or legitimate interests of the concerned parties.

If, after the indicated deadline has expired, the requested report or opinion ["dictamen"] has not been received, the actions shall proceed until the resolution is issued, without affecting any liability the functionary responsible for the omission may have incurred.

ARTICLE 83. The resolution shall put an end to the procedure and, in the part containing its provisions, all of the issues raised by the concerned parties and those resulting

from the case file, whether or not raised by the concerned parties, shall be decided.

REGULATIONS OF THE ORGANIZATION, OPERATION AND JURISDICTION OF THE EXECUTIVE BRANCH

Article 27. The General Secretariats are the agencies of communication of the Secretariats of State and their office-holders have functions of certification officials, with the following powers:

1. To assist the Secretary of State and the Under Secretaries of State;
2. To receive the requests and petitions submitted to the Office and keep an appropriate record for the control and custody of the case files;
3. To see that the matters being processed are dispatched by the established deadlines;
4. To keep a record of the decrees and *acuerdos* issued on matters of [their respective] Sector;
5. To keep a record of the official correspondence and relay it to whomever it concerns;
6. To keep the general archive of the Office;
7. To authorize the signature of the Secretary or the Under Secretaries of State and the decisions ["providencias"], *acuerdos* or resolutions issued by them;
8. To notify the concerned parties of the decisions ["providencias"] or resolutions and, as applicable, issue certifications and provide the grounds for documents;
9. To transcribe for the concerned parties any agreements issued on matters of the Sector;
10. To issue resolutions in those matters delegated to them by the Secretary of State;
11. To periodically inform their superiors of the matters submitted to be heard by them.

Article 28. The Secretaries General are also responsible for the coordination and the supervision of the following functions: Legal Services, Institutional Communication and External Cooperation Management Services.

Article 30. The following are powers of the General Directors:

1. To direct the technical and administrative activities of the respective dependency, including the distribution of tasks and the assignment of responsibilities of the personnel under their charge;
2. To direct, coordinate, control, monitor and evaluate any programs and projects carried out by the General Directorate;
3. To assist the Secretary and Under Secretary of State in the matters under their jurisdiction;
4. To issue decisions ["providencias"] and resolutions in those matters under their jurisdiction;
5. To propose to the Secretary of State, for his consideration, the internal structure of the General Directorate;
6. Any other powers as set forth by the special regulations or laws or those powers that the Secretary of State assigns or delegates to them in the exercise of his powers.

LAW OF THE JURISDICTION OF ADMINISTRATIVE AFFAIRS

ARTICLE 30. The acts of a general nature or provisions issued by the Public Administration may be challenged directly before the Jurisdiction of Administrative Affairs, once they have gone into effect administratively.

Challenges to the acts of a particular nature occurring in the enforcement of the administrative acts of a general nature, based on their failure to comply with the Law, shall also be permitted.

Nevertheless, in any case, any acts of a general nature that are to be complied with by the parties directly affected may likewise be subject to challenge by a suit brought under administrative law, without the parties first having to be subject to said acts or charged thereunder.

Failure to directly challenge a provision or act of a general nature or the dismissal of the action filed against it shall not prevent acts of individual enforcement from being challenged, based on the assumption contained in the preceding paragraph.

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on May 16, 2002, to the best of my ability.

Signed: /s/

Paul R. Sadur, M.A.
ATA Accredited Translator
Federally Certified Interpreter

WITNESS my hand and official seal, this 16th day of May A.D. 2002

Notary Public
State of Florida at Large

Frances R. Everedge
Notary Public, State of Florida
My comm. expires Dec. 26, 2003
Comm. No. CC 897604

APPENDIX R

COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW, TEGUCIGALPA, Municipality of the Central District, the twenty-third day of May of the year two thousand one. IN VIEW OF THE FOLLOWING: In order to render a Final Sentence, the lawsuit with the incoming number 179-00, filed by the attorney Maria Letizia Suazo de Guillén, of full age, of Honduran nationality and domiciled in this city, in her capacity as attorney for Mr. David Henson McNab against the State of Honduras through the Secretariat of the State of the Offices of Natural Resources, now Secretariat of State in the Offices of Natural Resources and the Environment, is suing for the absolute nullity of acts of a general nature because of a defect in competent jurisdiction of the exercise of the regulatory power attributed by the Constitution solely to the President of the Republic in the central public administration. THE PARTIES ARE: Plaintiff: Mr. David Henson McNab, represented in court by the attorney Marco Antonio Lanza. Defendant: The State of Honduras represented in court by the attorney Héctor Ramón Tróchez, who substituted the attorney Jose Bernardo Torres U. WHEREAS (1) the plaintiff alleges the following facts: 1) On January 4, 1995, the Secretariat of State of Natural Resources and the General Directorate of Fisheries and Agriculture issued what they called "Resolution No. 001-95," signed by the then Minister of that area and the Director General of Fisheries (DIGEPESCA), setting forth regulatory standards concerning the closed season for shrimp, lobsters and conchs in the Atlantic Ocean, as well as the forms or means for catching lobsters and shrimp. 2) On December 5th, the same authorities issued what they called "Resolution No. 030-95," whereby they set forth regulations concerning the closed sea-

son for catching shrimp, lobsters and conchs in the Atlantic Ocean, in addition to the nets of shrimp boats and provisions for catching lobsters and the minimum date for catching conchs. 3) On December 17, 1997, the Secretariat of State for Agriculture and Livestock and the Director General of Fisheries and Agriculture issued what they called, "Resolution no. 031-97," signed by the Minister, the Director General of Fisheries and the Secretary General of the aforesaid Secretariat of State whereby they set forth general provisions related to the closed season for catching shrimp, lobsters and conchs in all of the species in the Caribbean Sea and coastal laguna systems and, in addition, the closed season for the giant conch. 4) On April 3, 2000, the Secretariat of Agriculture and Livestock and the Director General of Fisheries and Agriculture issued what they called "Resolution No. 006-2000," by means of which they set forth general provisions establishing the closed season for catching white shrimp, brown shrimp and pink shrimp, as well as the closed season for catching the common lobster, giant conch and queen conch and, in addition, other regulations related to fishing vessels and indicating sanctions for certain violations of these general rules. 5) The aforementioned Resolutions are invalid because the first two were issued by the Secretary of State in the Offices of Natural Resources and the Director General of Fisheries and Aquiculture and the last two by the Secretary of State in the Offices of Aquiculture and Livestock and the Director General of Fisheries and Agriculture with the countersignature of the Secretary General of the aforesaid Secretariat of State, without having competent jurisdiction to issue the aforesaid regulatory rules because the power belongs in the Central Administration to the President of the Republic pursuant, to Article 245, Item 11, of the Constitution and the Secretaries of State only authorize with their signature the regulations of the President pursuant to Article 248 of the Constitution itself. Accordingly, issuing administrative acts of a general nature outside the law, i.e., in violation of the

Constitution, are absolutely null and void as ordered by Articles 321 of the Constitution and 34, Paragraph One, of the Administrative Procedure Law, which reads verbatim: "Notwithstanding what is set forth in the essential laws, the administrative act is null and void . . .". The Constitution is a special law in the political and legal order, because it structures the organization of the State and the rights of the governed; it is, doubtless, the most special law of all laws in the legal order because it creates the organs of the State and creates the law. Furthermore, according to Article 36 of General Law of the Public Administration, the Secretaries of State, with regard to the regulatory power, only have the power of "issuing the regulations of internal organization of their respective offices" and only by a Law of the Congress may a given Secretariat of State be given regulatory power, in which case the law expressly states this mentioning the Secretariat of State that will enjoy this prerogative because, when the law uses the expressions, "by means of the Secretariat of Natural Resources . . .", as in Article 5, Paragraph One, of the Fisheries Law or else the Executive Branch through the Secretariat of Natural Resources, as in Article 11 of the aforesaid Law, it obviously uses the term Executive Power referring to the President of the Republic, who is its Office Holder, and not the Secretariat of State in the area, who is nothing more than the assistant of the President as conceived by Article 247 of the Constitution. 7) In addition to being defective with absolute nullity because of a lack of competent jurisdiction, the Resolutions directly challenged also have the defect of annullability by reason of the form, since, being administrative acts of a general nature or, i.e., regulatory provisions, they should not have adopted the form of Resolutions, but of Orders *[Acuerdos]* as required by Article 118, Item 2, of the General Law of the Public Administration which states: "The [following] shall be issued by a Order; 1) . . . , 2) Any acts of a general nature issued in the exercise of the regulatory power. WHEREAS (2): The defen-

dant in its reply to the lawsuit claims the following: it accepts facts numbers 1, 2, 3 and 4 inasmuch as it is true that Resolutions Numbers 001-95, 030-95, 031-95 and 006-2000 were issued. In fact number six it rejects the first paragraph because of being contrary to law, since, even though it is true that the power to issue regulatory rules belongs in the Public Administration to the President of the Republic and that the Secretaries of State only authorize with their signature the regulations of the President, the challenged administrative acts are Resolutions and not Regulations so that the signature of the President is not required. These Resolutions were issued by the officials legally authorized by the Law to carry out this type of acts as stipulated by Article 122 of the Public Administration Law. It rejects the second paragraph of fact number six in view of the fact that the aforesaid acts are contemplated expressly in the current Fisheries Law; in addition, it rejects the third paragraph in view of the fact that the General Law of the Public Administration in Article 30, Item 8, thereof stipulates as a power of the Secretaries of State issuing Degrees and Resolutions in the matters under their competent jurisdiction and those as delegated to them by the President of the Republic, and seeing that they are implemented and, in the case of proceedings, the enforcement of the current Fisheries Law is the exclusive competency of the Secretariat of Agriculture and Livestock previously called Natural Resources. It rejects fact number seven as contrary to law, inasmuch as the Fisheries Law empowers the Secretariat of Agriculture and Livestock, previously called Natural Resources, to issue the Resolutions and any other measures deemed necessary for the greater efficacy of all of the fishing activities. It rejects fact number eight due to the fact that, although it is true that the Fisheries Law in Articles 5, 7, and 45 thereof, among others, set forth that regulations should be issued for the enforcement of the aforesaid law, it is also true that the Law says that the Secretariat of State may issue the appropriate Resolutions, so that, inasmuch as the plaintiff is

against the Fishery Resolutions that have been issued under the Fisheries Law and which are administrative acts of a general nature by means of which regulations have been imposed on the fishery business to attempt to prevent the elimination of the resources, this would be against what is being attempted to be regulated. It rejects the legal grounds invoked by the plaintiff. The explanation of the nature with which of the action under administrative law is deduced in the suit for absolute nullity of administrative acts in a general nature is totally rejected, since the plaintiff himself admits that the challenged acts are final acts, inasmuch as they were not appealed by the deadlines set forth by the Law. The Resolutions alluded to by the plaintiff's Attorney have been legally issued pursuant to the provisions of Article 122 of the General Law of the Public Administration and on the basis of the Fisheries Law contained in Decree 154 dated May 19, 1959. The administrative Resolutions represent the decision or disposition of the State to enforce legal provisions, inasmuch as the existence of Regulations is not necessary; it is sufficient for it to be based on a current law. An Administrative Resolution, since it is not regulations, does not require any delegation by the President of the Republic, even when he is the only one within the Central Public Administration to issue Regulations as such. The Fisheries Law states in Article 3 thereof all of the species of fish, crustaceans, mollusks, aquatic mammals and reptiles, marine plants and all other species that comprise the marine, lacustrine and fluvial flora and fauna are State property of common domain and public use. They may be fished, removed and used and traded freely by all Hondurans subject to the restrictions of this Law, the Regulations for its enforcement and other resolutions as stated, without the possibility of granting monopolies, auctions, lease contracts of any kind for fishing in all the waters of the sea, rivers, bays, harbors, coves, constructions, lagoons, lakes, canals, adjacent keys and islands, etc., or in part of them by any individual or entity involving privileges

that violate the right to public property. The General Law of the Public Administration in Article 10 thereof states that the following are organs of the Executive Branch: 1) the Presidency of the Republic, 2) the Council of Ministers and 3) the Secretariats of State. Article 11 of the same legal corpus sets forth that the President of the Republic is responsible for the supreme direction and coordination of the centralized and decentralized public administration. The current Fisheries Law in Article 5 thereof states that the Executive Branch by means of the Secretariat of natural resources, now Agriculture and Livestock, is the higher authority in matters of fisheries and matters related thereto; obviously, the resolutions do not necessarily have to be issued by the office holder of the Executive Branch, since the Secretariat of State in the Offices of Agriculture and Livestock, as a organ of the Executive Power, have sufficient legal powers to issue Resolutions and other measures it deems necessary for the better efficacy of all of the fishery activities as set forth in Articles 3, 5, 7, Items c), i), j). Likewise, the General Law of the Public Administration in Article 36, Item 9), thereof sets forth as common powers and duties of the Secretaries of State the issuing of Orders *[Acuerdos]* and Resolutions in the matters under their jurisdiction and those delegated to them by the President of the Republic and see to their enforcement. WHEREAS (3): the plaintiff filed the following exhibits: Documentary Exhibit No. 1, Documentary Exhibit No. 2, Documentary Exhibit No. 3, Communication Exhibit No. 4, Documentary Exhibit No. 6, Documentary Exhibit No. 7 and Exhibit No. 11 (Inspection by the Judge). WHEREAS (4): the facts alleged in the lawsuit were reliably proven as follows: on pages 66-67 of the proceedings that the Resolutions issued by the authorities of the Secretariat of Agriculture and Livestock are regulatory provisions in matters of fisheries, whose power to issue them lies solely with the Office Holder of the Executive Branch through the respective Secretariat of State; also authenticated in this exhibit are the alleged facts

numbers 6 and 7 referring to the absolute nullity of the Resolutions, since the first two were issued by the Secretary of State in the Office of Natural Resources and the Director General of Fisheries and the last ones by the Secretary of State in the Offices of Agriculture and Livestock and the Director General of Fisheries and Agriculture, with the countersignature of the Secretary General of the aforementioned Secretariat of State, without having competent jurisdiction to issue these regulatory rules, because the competent jurisdiction lies with the President of the Republic, pursuant to Article 245, Power 11, of the Constitution of the Republic and their nullity is set forth in Article 34 of the Administrative Procedure Law. Also, fact 7 of the lawsuit was proven, referring to the fact that these Resolutions also contain the defect of annullability by reason of form, since, inasmuch as they are administrative acts of a general nature, they should not have adopted the form of Resolutions but of Degrees, as required by Article 118, Item 2, of the General Law of Public Administration. With Exhibit Number 2 (see pages 66 and 67) in the opinion of the Bar Association of Honduras, it was proven that the aforementioned resolutions are regulatory provisions and the power to issue them lies with the Office Holder of the Executive Branch and also facts 6 and 7 of the lawsuit were authenticated; with documentary exhibit number 3 (see pages 70 and 76), consisting of the legal opinion of the attorney Ramiro Lozano, it is again proved that the power to issue the aforesaid Resolutions lies with the Office Holder of the Executive Power and, accordingly, when the authorities of the Secretariat of Agriculture and Livestock issue them, there is a manifest violation of the power of the President of the Republic. With Exhibit Number 4 (see pages 158 through 161), in the form of a Report of the Office of the Attorney General of the Republic, it was authenticated that the Secretary of Agriculture and Livestock did not send to issue an opinion the general regulations for the enforcement of the Fisheries Law or the drafts of the regulatory provisions of the

aforementioned Law; and the Secretariat of Finance and the Secretary General of the Secretariat of State in the Presidential Office gave an opinion in the same terms (see pages 138, 161, 163 through 165, respectively). Exhibit Number 6 submitted copies of the Official Journal *La Gaceta* Nos. 29,078, 29,081 and 29,082 in which there appear, as well as exist, hundreds of regulations, regulatory rules or provisions of a general scope issued by means of Orders of the President of the Republic through Article 245, Item 11, of the Constitution of the Republic. With Exhibit Number 7, it was authenticated that the Fisheries Law, Decree No. 154, of March 19, 1959, was never regulated and that in order to take the place of said regulations, Executive Orders and Ministerial Resolutions were issued. With Exhibit Number 11 (see page 154), it was authenticated that there are no Regulations of the Fisheries Law, but only resolutions issued by the Secretariat of State and the Director General of Fisheries and Agriculture. With all of this evidence, it was authenticated that the Resolutions which were issued by the Secretariat of State in the Office of Agriculture and Livestock to the regulate the Fisheries Law are null and void as a matter of taw because they were drawn up in violation of Article 245, Item 11, of the Constitution of the Republic. WHEREAS (5): although it is true the lawsuit is directed against resolutions that are final and are producing effects, the Law of the Jurisdiction of the Administrative Law in Article 32 thereof sets forth that a lawsuit under administrative law will be admitted against final acts and those confirmatory acts of final acts referred to by Item a) of Article 31 of the same law whenever they are null and void as a matter a law and are producing effects; but this is only for purposes of their annulment and future inapplicability, so that the action must be declared according to law. WHEREAS (6): the Administrative Procedure Law sets forth in Article 24 thereof that the acts will be issued respecting the procedures provided for in the legal code and, therefore, those acts in which a violation of the legal code is in-

curred are annullable and according to Article 34 of the same law in Item c) thereof issued acts, totally and absolutely regardless of the procedure set forth, are null and void as a matter of law. THEREFORE: This Court of the First Instance of Administrative Law with jurisdiction in the Departments of Francisco Morazán, Comayagua, Intibuca, La Paz, Olancho, El Paraíso, Choluteca, Valle and Gracias a Dios, dispensing justice on behalf of the State of Honduras and pursuant to Articles 314, 318, 245, Power 11, and 248 of the Constitution of the Republic, l, 11, 40 and 147 of the Law of the Organization and Powers of the Courts; 1, 2, 7, 9, 12, 13, 25, 26, 32, 42, 48, 78, 79, 81, 82, 95, 96, 129 and 134 of the Law of the Jurisdiction in Matters Under Administrative Law; 184, 185, 186, 187, 190, 191 and 192 of the Civil Procedure Code; 1, 24, 25, 34 and 35 of the Administrative Procedure Law; 1, 7, 8, 118, Item 2 of the General Law of the Public Administration; Official Letter No. 808J-3622-89 and Order No. 3-98 of the Honorable Supreme Court of Justice. RULES: First: To declare that the action is according to law, inasmuch as the challenged acts do not conform to law by virtue of having violated the legal code at the time they were issued. Second: the challenged Resolutions No. 001-95 of January 4, 1995, No. 030-95 of December 5, 1995, No. 031-97 of December 17, 1997, and No. 006-2000 of April 3, 2000, are entirely voided, but this is only for purposes of their annulment and future inapplicability: This Resolution does not confer any right to claims. AND ORDERS: that, if by the deadline, no appeal is filed against this decision, it becomes final, with a communication, issued with the stylistic insertions to the Secretary of State in the Offices of Agriculture and Livestock for him to implement this decision immediately by adopting whatever resolutions as may be according to law and enforcing the statements contained therein; no administrative file is being returned since it had not been submitted by virtue of the fact that this document did not exist inasmuch as the challenged acts were acts of a general na-

ture. Because there were rational grounds for litigation, the party defeated in the lawsuit is exempted from expenses. NO COST. LET NOTICE BE SERVED.
[illegible signature]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW JUDGE. Tegucigalpa, Honduras"]
[illegible signature]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW. Clerk. Tegucigalpa, Honduras."]
[illegible signature]
[New page:]
[Handwritten:] The City of Tegucigalpa M.D.C. on the twenty-fifth day of the month of May of the year two thousand one, the attorney Marco Antonio Lanza was notified of the decision rendered on the twenty-third day of May of the year two thousand one, signs with understanding at 10:20 a.m. [illegible signature]
[Rubber Stamp: "BAR ASSOCIATION OF HONDURAS. {ILLEGIBLE NUMBER} MARCO A. LANZA GÓMEZ".]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW. CLERK. TEGUCIGALPA, HONDURAS"]
In the city of Tegucigalpa M.D.C., on the twenty-eight day of the month of May of the year two thousand one, the attorney José Bernardo Torres C. has been notified of the decision dated the twenty-third day of the current year as above, signs with understanding and at the same time requests a copy of this decision it being 2:10 p.m. [illegible signature]
[Rubber Stamp: "BAR ASSOCIATION OF HONDURAS. 1893?507. JOSE BERNARDO TORRES AMANZOR".]
[illegible signature]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW. CLERK. TEGUCIGALPA, HONDURAS".]

[New page:]
[Handwritten:] May 25, 2001 10:30 p.m.
Notification by Table of Notices
Judge of the Court of First Instance of Administrative Law
I, Marco Antonio Lanza, acting in my capacity as Attorney for Mr. DAVID HENSON McNAB in the lawsuit that he has brought against the State of Honduras, the Secretariat of Agriculture and Livestock through the Attorney General of the Republic, so that the nullity and future inapplicability of some resolutions will be declared, respectfully come before you requesting that the ruling dated the twenty-third day of May of the current year be served by means of the Table of Notices of the Office on the Attorney for the defendant JOSE BERNARDO TORRES AMANZOR.
I ask Your Honor to admit this brief, process it according to law and rule in conformity.
Tegucigalpa, May 25, 2001.
[illegible signature]
[Rubber stamp: "BAR ASSOCIATION OF HONDURAS. {illegible number} MARCO A. LANZA GOMEZ"]

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on June 14, 2001, to the best of my ability.

Signed: /s/

Paul R. Sadur, M.A.
ATA Accredited Translator
Federally Certified Interpreter

State of Florida, County of Escambia
The foregoing instrument has been acknowledged before me this 14th day of June, 2001 by Paul R. Sadur who produced Fla. Driver's License as identification

/s/
Signature of Notary Public
___ Personally Known _X_ Produced I.D.

Barbara L. Hinote
Notary Public, State of Florida
Commission # CC 739096
Expires May 3, 2002
BONDED THRU
ATLANTIC BONDING CO., INC.

APPENDIX S

CERTIFICATION

The Undersigned Clerk of the Court of Appeals for Administrative Law, with jurisdiction at the national level, on today's date certifies: The judgment that literally states: **COURT OF APPEALS OF ADMINISTRATIVE MATTERS.** Tegucigalpa, Municipality of the Central District, on the eleventh day of October, two thousand one. **INASMUCH AS:** In order to hand down a final judgment in the appeal filed by **JOSÉ BERNARDO TORRES UMANZOR**, Esq., in his capacity as attorney for the State of Honduras, through the Secretariat of State in the Offices of Agriculture and Livestock, against the final judgment dated the twenty-third day of the month of May, located in Tegucigalpa, Municipality of the Central District, in the suit brought by MARÍA LETIZIA SUAZO DE GUILLÉN, Esq., in her capacity as attorney for Mr. DAVID HENSON McNAB, against the State of Honduras, through the Secretariat of State in the Offices of Agriculture and Livestock, retained to petition for the absolute nullity of acts of a general nature consisting of Resolutions No. 001-95 of January 4, 1995, No. 030-95 of December 5, 1995, No. 031-97 of December 17, 1997, and No. 006-2000 of April 3, 2000, because of a jurisdictional flaw in the exercise of the regulatory power conferred by the Constitution solely upon the President of the Republic in the Central Public Administration. This exhibit is recorded under Number **063-2001. THE PARTIES ARE: APPELLANT:** The State of Honduras, through the Secretariat of State in the Offices of Agriculture and Livestock, represented at Court by JOSÉ BERNARDO TORRES UMANZOR, Esq. **RESPONDENT:** Mr. DAVID HENSON McNAB, represented at court by the Attorney MARCO ANTONIO LANZA LÓPEZ. The

final judgment appealed is the one that states in its relative part: COURT OF FIRST INSTANCE IN ADMINISTRATIVE LAW. **Tegucigalpa, Municipality of the Central District, the twenty-third day of May, two thousand one. . . . DECISION: First: That the action is declared to be in order, inasmuch as the acts contested because of having violated the legal code when they were issued do not adhere to the Law. Second: Accordingly, the contested Resolutions No. 001-95 of January 4, 1995, No. 030-95 of December 5, 1995, No. 031-97 of December 17, 1997, and No. 06-2000 of April 3, 2000, are annulled in their entirety, but solely for purposes of their annulment and future inapplicability. This Resolution confers no right to claims. WITHOUT COST. NOTICE IS THUS SERVED.** **WHEREAS:** Pursuant to Articles 245, item 11, and 248, of the Constitution of the Republic, in order for regulations to have legal effect, they must be issued by the President of the Republic and authorized by the Secretaries of State in their respective areas or by the Under Secretaries as applicable. **WHEREAS:** The Jurisdiction in Administrative Law shall rule within the limits of the claims filed by the parties and the allegations inferred to lay the grounds for the action and the challenge. **WHEREAS**: It is incumbent upon the Courts of Law to enforce the laws in specific cases. **WHEREAS:** The final judgment against which appeal is filed, dated the twenty-third day of the month of May, two thousand one, handed down by the Court of First Instance in Administrative Law, located in Tegucigalpa, Municipality of the Central District, has been made compliant with the law, so that its confirmation is in order. **THEREFORE:** This Court of Appeals in Administrative Law, with jurisdiction at the national level, in the name of the State of Honduras, by a UNANIMOUS VOTE, with the Magistrate SAUL SUAZO LARA preparing the court's opinion, pursuant to Articles 303 and 304, Item c), and 134 of the Constitution of the Republic; 1, 2, Item a), 7, Item b), 9, 35, First Paragraph, 89,

129, Item c) and 134 of the Law of Jurisdiction in Administrative Law. **RULES: FIRST:** The appeal filed is declared to be groundless. **SECOND:** The final judgment against which appeal was filed, handed down by the Court of First Instance in Administrative Law, located in Tegucigalpa, Municipality of the Central District, on the twenty-third day of the month of May, two thousand one, and which appears on folio number two hundred eight (208) to folio number two hundred eleven back (211b) of the first exhibit of proceedings, is **CONFIRMED AND ORDERS:** After this judgment becomes firm, that the appropriate certification be communicated to the Court from which it originated, so that it will proceed in conformity with the decision. WITHOUT COST. NOTICE IS THUS SERVED. **SIGNATURE AND SEAL.** FLORENTINO LÓPEZ MILLA. PRESIDING MAGISTRATING ACCORDING TO LAW. **SAÚL SUAZO LARA, REGULAR MAGISTRATE. PLUTARCO RIVERA CASTELLANOS, ALTERNATIVE MAGISTRATE. HUMBERTO OCHOA OCHOA, CLERK.**

Issued in the City of Tegucigalpa, Municipality of the Central District, on the fifteenth day of the month of October, two thousand one.

[Rubber stamp with a coat-of-arms in the center, reading: "COURT OF APPEALS IN ADMINISTRATIVE LAW, Tegucigalpa, Honduras".]

[illegible signature]

HUMBERTO OCHOA OCHOA

Clerk

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by

the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on October 23, 2001, to the best of my ability.

Signed: _____

Paul R. Sadur, M.A.
ATA Accredited Translator
Federally Certified Interpreter

WITNESS my hand and official seal, this 16th day of May A.D. 2002

State of Florida, County of Escambia
The Foregoing instrument has been acknowledged before me this 23rd day of October, 2001 by Paul R. Sacar who produced his driver's license as identification

/s/
Signature of Notary Public
___ Personally Known _X_ Produced I.D.

Jay F. Shaw
Commission # CC 973212
Expires Nov. 24, 2004
Bonded Thru
Atlantic Bonding Co., Inc.

APPENDIX T

[Coat-of-arms]

Republic of Honduras, Central America

National Human Rights Commission

SPECIAL REPORT OF RECOMMENDATIONS

The National Human Rights Commissioner, having analyzed complaint number 08.01-2000.11.14047, submitted by Mr. Steven Guillén Suazo, acting on behalf of Mr. David Henson McNab, because of considering that as the result of an act that involves an illegitimate, arbitrary, defective, negligent and discriminatory practice by the Secretariat General of the Ministry of Agriculture and Livestock, the human rights of Mr. McNab have been violated, resulting in his unfair and groundless detention in a prison of the United States of America: within the scope of its powers and on the basis of articles 1, 59, as amended by Decree No. 191-94, 70 paragraph 1, 80, 96, 205 No. 1, 245 No. 11, 321 and 323 of the Constitution of the Republic; Articles 1, 2, 3 and 16 of the American Human Rights Convention; Articles 6 and 20 of the Universal Declaration of Human Rights; Articles 16 and 20 of the International Covenant of Civil and Political Rights; Article 21 of the American Declaration of the Rights and Duties of Man; Articles 1, 9, *items 1, 2, 4 and 5*, 10, 16, 21, 21, 28, 42, 43 of the Organizational Law of the National Human Rights Commissioner; Articles 1, 20, 38, 41, 42 and 45 of the General Regulations of the Organizational Law of the National Human Rights Commission, has deemed that it is appropriate to draw up this Special Report containing recommendations of a specific nature to the Secretariat of State in the Offices of Agriculture and Livestock.

I. BACKGROUND

1. On September 7th of the current year, a complaint was filed on behalf of Mr. David Henson McNab who was indicted and sentenced to eight years of prison in the United States of America, because of having sold lobsters to businessmen of this country. The complainant states that the basis of the sentence handed down in the United States of America was an Affidavit given on the date of August 10th of the current year by the General Secretariat of the Ministry of Agriculture and Livestock, which is described by the complainant as an illegitimate, arbitrary, abusive, defective, negligent and discriminatory act because of asserting therein the following points:

A. Effectiveness of Resolution Number 030-95

The Court for Administrative Law handed down a final judgment declaring Resolution Number 030-95 to be null and void; however, this judgment does not produce any legal effects because of having been appealed and is awaiting a decision. Furthermore, the Secretariat of Livestock and Agriculture is of the opinion that the judgment cannot have retroactive effects, inasmuch as it is not of a criminal but rather administrative nature.

B. Effectiveness of Decision ["Acuerdo"] Number 0008-93, until December 2, 1999.

Decision ["Acuerdo"] Number 0008-93 was promulgated by Decree ["Decreto"] Number 40 of May 13, 1993. The Secretariat of Agriculture and Livestock bases its effectiveness until December 2, 1999, on the fact that Decree Number 157-94 does not expressly refer to Decree 40, so that its repeal is tacit and leaves in effect anything that is not in conflict with the new law contained in Decree Number 157-94, as provided for by Article 44 of the Civil Code. Subsequently, Decree Number 40 was repealed expressly by Decision ["Acuerdo"] Number 1081-99, dated December 2, 1999.

C. Effectiveness of Article 70 of Decree Number 154 (Fisheries Law), Later Amended by Decree Number 245-2000. Pursuant to what was stated by the Secretariat of Agriculture, and Livestock, the amendment of Article 70 of the Fisheries Law maintains the prohibition against destroying or collecting eggs of aquatic species pursuant to the stipulations in the same item k), which provides, in *numerus apertus*, that any other activity not expressly mentioned in the preceding items, but is of a similar nature, shall also be sanctioned. The Secretariat of State for Agriculture and Livestock bases the foregoing on Article 44 of the Civil Code, from which it makes the following Interpretation: "The amendment to Article 70 includes the parts of the existing Article 70 not in conflict with the provisions of the amendments."

2. Once the points of the affidavit given by Liliana Paz, Esq., in her position of Secretary General of the Ministry of Agriculture and Livestock have been raised, the complainant refers to each one of them as follows:

A. "Resolution 030-95: This is a resolution that sets forth regulatory measures which, according to the Constitution, is a power of the President of the Republic and not of the Minister. This opinion has been confirmed by the decision of the Court for Administrative Law, voiding the contested actions by virtue of the fact that the legal system was violated when they were issued. Subsequently, this judicial judgment was appealed by the representative of the State of Honduras.

B. "Decision ["Acuerdo"] 0008-93: These regulations were issued to enforce the Meat Industrialization Law, which was repealed as in January 1995 by Decree 157-94. Since the Law has been repealed, the regulations for its enforcement are no longer valid, so that they should not be applicable for sanctioning anyone after 1995."

C. "Fisheries Law, Article 70, No. 3: Article 70 of the Fisheries Law was amended by Decree Number 245-2000, omitting what is set forth in the original Article 70, Number

3. This new Decree has a retroactive effect inasmuch as it benefits the defendant, based on Article 96 of the Constitution and on the American Human Rights Convention (Article 9), ratified by Honduras by Legislative Decree No. 253."

3. Subsequently, on the twenty-ninth day of October of the current year, Maria Letizia Suazo de Guillén, Esq., submitted to the National Human Rights Commissioner a brief that was attached to a copy of the certification of the judgment handed down on the eleventh of October of the current year by the Court of Appeals for Administrative Law, by means of which, it CONFIRMS the judgment handed down by the Judge of the Lower Court on May 23, 2001.

II. ANALYSIS OF THE COMPLAINT AND ITS DOCUMENTS.

1. First of all, the National Human Rights Commissioner states that the Affidavit dated August 10, 2001, given by Liliana Paz Paniagua, Esq., in her capacity as Secretary of the Ministry of Agriculture and Livestock is a formal action as an official of the Government, which when taken by the United States judicial authorities as an official opinion regarding the effectiveness of certain legal rules, produced effects on the person of David Henson McNab, which makes it liable to be heard by the National Human Rights Commissioner, who, on the basis of Article 38 of its Organizational Law, can describe it as an abuse of power, arbitrariness, legal error, negligence or omission.

2. With the Law understood to be an expression of the general will, originating by representativity through the Legislative Branch, the irreducibility of the Principle of Legality as an essential foundation of a state in which the rule of law prevails is more easily understood. Therefore, the legality of any act originating in the Administration constitutes the actual, practical and tangible materialization of a state in which in the rule of law prevails. For this reason the Constitution of the Republic orders all of the servants of the

State to act in conformity with the Law and stipulates that any action engaged in outside of it is null and void; this is by virtue of the fact that they are the depositories of authority, subject to Law and never above it. Taking this into account, the Commissioner refers below to the points of the Affidavit related to the filed complaint.

a. Resolution Number 030-95 of the Secretariat of Natural Resources and the General Directorate of Fisheries and Aquaculture, as published in the Official Journal "La Gaceta" ["The Gazette"], on January 24, 1996, in which the minimum size for lobsters is established. This resolution of a regulatory nature was issued by the Secretary of State in the Offices of Natural Resources and the General Director of Fisheries and Aquaculture, which, in the opinion of the Commissioner, violates the Constitution of the Republic, which sets forth in Article 245, Number 11, thereof the power possessed by the President of the Republic to issue decisions and decrees and issue rules and regulations under the law, referring to the General Public Administration Law. Under the provisions of this Law, the administrative action known as a RESOLUTION is reserved for any decisions made to conclude a procedure in which private parties take part as concerned parties. On the other hand, administrative actions of a general nature and of a regulatory nature issued to expand precepts of a law by supplementing or explaining them are called executive, executory or subordinate regulations: what are dictated *secundum legem* ["according to the law"] and which will take the exclusive form of Decrees ["Decretos"], which must be signed by the President of the Republic or by the Chairman in a Council of Ministers, countersigned, as applicable, by him or the Secretaries of State pursuant to the provisions of the Law. The Secretaries of State with regard to the regulatory power may only issue regulations for the internal organization of their respective offices; we refer to the autonomous regulations known as independent or constitutional regulations, which are issued

praeter legem ["in addition to the law"]; or else the delegated regulations, which refer to those issued by express and direct delegation of a law. These two latter items must be issued in the form of Decisions ["Acuerdos"]. In conclusion, Resolution Number 030-95 is null and void and, therefore, does not produce legal effects because of having been issued by a entity without jurisdiction, in an erroneous manner and beyond the powers conferred upon it by the law.

Furthermore, the National Human Rights Commissioner is of the opinion that the official opinion of the Secretariat of Livestock and Agriculture about the non-retroactivity of the law is restricted and, therefore, ambiguous, inasmuch as it identifies and limits the retroactivity to the law's being formally criminal; however, this restricted interpretation of the rule can limit this right, so that the Commissioner advocates a broader vision thereof, extended to the entire legal rule the effect of which occurs in criminal matters; i.e., the retroactivity is not of the Law per se, but of its effect on criminal matters. The Constitution does not require the law to be a criminal law in order for it to be retroactive in the event that it favors the defendant; it requires that its effect be in criminal matters.

b. Decision ["Acuerdo"] Number 0008-93 (Official Inspection and Health and Hygiene Regulations of Fisheries Products promulgated pursuant to Decree Number 40 of May 16, 1973 (Meat Industrialization Law). For the National Human Rights Commissioner, this Decision ceases to be in effect on January 13, 1995, by virtue of the publication in the Official Journal "La Gaceta" ["The Gazette"], of Decree Number 157-94 or Plant and Animal Health Law, which in Article 42 thereof expressly repealed the Meat Industrialization Law; by virtue of the old maxim that what is accessory follows the fate of the principal. Inasmuch as the repeal of Decision Number 0008-93 is unnecessary, which decision is found in Article 124 of

Decision ["Acuerdo"] No. 1081-99 published on December 2, 1999.

c. Article 70 of the Fisheries Law Amended by Decree Number 245-2000. The National Human Rights Commissioner considers that Article 245-2000 totally amended Article 70 of the Fisheries Law, thereby absolutely doing away with the points on which the article was drawn up in its original form. It should be explained that the Secretariat of Livestock and Agriculture failed to notice that in this case Article 44 of the Civil Code was not applicable, inasmuch as this article refers to the repeal of a law; however, in this case we are faced with the amendment of an article, involving two well-differentiated situations. Furthermore, with regard to sanctions and penalties, the Law has been uniform in maintaining a regimen of *numerus clausus* pursuant to the principle *nulla poena sine lege* ["no penalty without a law"]. Finally, in conclusion, Article 70 as amended of the Fisheries Law left without sanction the destruction or collection of the eggs of aquatic species.

d. The National Human Rights Commissioner, being aware that he does not have jurisdiction to amend or declare null and void the actions of the Administration, gives his opinion that the administrative act issued by the official of the State, Liliana Paz Paniagua, Esq., contains legal errors that must be amended in the future; to this end, having been empowered by the Organizational Law of the Commissioner to suggest that the criteria that generated the aforementioned legal errors be amended, has deemed it appropriate to report the complaint based on merits of the case to the Secretary of State in the Offices of Agriculture and Livestock, with the recommendations listed below.

III. RECOMMENDATIONS

By virtue of the preceding analysis and considerations, the National Human Rights Commissioner **RECOMMENDS** to the

Secretariat of State in the Offices of Agriculture and Livestock:

1. Disqualify as an error of law the Affidavit issued by Liliana Patricia Paz Pagoaga, Esq., and, accordingly, issue an Affidavit in which the correct sense and scope of the rules are set forth, establishing the ineffectiveness of Resolution Number 030-95 and Decision ["Acuerdo"] 0008-93 and Article 70 in connection as set forth in this Affidavit.

2. Abstain in the future from enforcing rules that are not in effect and see that the officials do not alter the meaning and scope thereof, especially what refers to Article 70 as amended of the Fisheries Law. In the event that there exists a need to include any other assumption that should be in this Article in order to provide protection to the life of aquatic species, it is suggested that any reforms as may be necessary be undertaken in order to avoid their continued incorrect and irrational operation.

In order for the Secretariat of State in the Offices of Agriculture and Livestock to report on the implementation or objections of the preceding recommendations, it is given a period of one month, counted from the day on which they are received; should the deadline expire without a reply, this shall be made publicly known. (Article 45 of the Organizational Law of the National Human Rights Commissioner).

Given in the city of Tegucigalpa, Municipality of the Central District, on the eighth day of the month of November, 2001.

[illegible signature]
LEO VALLADARES LANZA
National Human Rights Commissioner
Public Ombudsman

[Rubber stamp with figure in center: "NATIONAL HUMAN RIGHTS COMMISSIONER. TEGUCIGALPA, {ILLEGIBLE}".]

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on November 17, 2001, to the best of my ability.

Signed: /s/

Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

Betty C. Martin
Commission # DD 036914
Expires August 4, 2005
Bonded Thru
Atlantic Bonding Co., Inc.

APPENDIX U

SAG **SECRETARIAT OF AGRICULTURE AND LIVESTOCK**

By producing more, we will preserve peace

Secretariat of State in the Offices of Agriculture and Livestock, Tegucigalpa, Municipality of the Central District, on the fifteenth day of the month of November of the year two thousand one.

CONSIDERING: In order to act on the Special Report with Recommendations, issued by the National Human Rights Commissioner, on the eighth day of November of the year two thousand one, related to the complaint filed by Mr. Steven Guillén, acting on behalf of Mr. David Henson McNab before the aforementioned Commissioner, because of considering that the Affidavit given by Liliana Paz P., Esq., on the tenth day of August of the year two thousand one, contains legal errors.

WHEREAS the Legal Department of this Secretariat of State, after reviewing the facts alleged in the related report, considering in addition the decisions of the Courts of Administrative Law related to the case and after having made the relevant consultations, is of the opinion that what is set forth by the National Human Rights Commissioner in his report and in his Recommendations, is totally correct, so that it was of the opinion that the aforementioned recommendations be adopted, as well as the appropriate corrective measures;

WHEREAS, in the Affidavit given by Paz P., Esq., in her capacity as Secretary General of this Secretariat, an error of law was incurred, according to the examination the National Human Rights Commissioner made of the matter, based on

the nation's laws and on international conventions and treaties signed and ratified by the Republic of Honduras;

WHEREAS, according to Article 43 of the Organizational Law of the Human Rights Commissioner, this Secretariat of State is obligated to respond in writing to the Commission with whatever is relevant with regard to the Special Report with Recommendations issued by that national institution in charge of guaranteeing the effectiveness of the rights and freedoms recognized in the Constitution of the Republic and the International Treaties and Agreements ratified by Honduras;

WHEREAS there are grounds for issuing the corresponding Resolution to give the answer required by the Law to the Recommendations of the National Human Rights Commissioner and to take the corrective measures under Law.

Therefore,

HE RESOLVES:

FIRST: On the basis of the Special Report and Recommendations of the National Human Rights Commissioner, to disqualify as an error of law the Affidavit given by Liliana Paz P., Esq., on the tenth day of August of the year two thousand one, as well as any other statement contrary to what is set forth in this Resolution, inasmuch as it contradicts the Constitution of the Republic, the laws of the country, the international treaties and conventions and the principles of law.

SECOND: That the official position of this Secretariat of State, as well as the correct sense and scope of the challenged rules, is that set forth below:

1) **Resolution 030-95.** According to a decision of the Court of Administrative Law dated May 23, 2001, Resolution 030-95 and other resolutions were totally rendered null and void, but only for the purposes of making them null and void and inapplicable in the future. However, the fi-

nal and firm judgment of the Appeals Court of that same Court dated October 11, 2001, expands the ruling by determining that the contested Resolutions are null and void and, therefore, do not produce legal effects because of having been issued by an authority without jurisdiction erroneously and beyond the powers that the law grants to the issuer thereof. This is owing to the fact that they contain regulations and, since they had not been issued by the President of the Republic and authorized by the corresponding Secretary of State, **they never had the force of law** pursuant to what is set forth in the Constitution of the Republic, Articles 245, Number 11, and 248.

The aforementioned decision of the Court of Administrative Law has a retroactive effect in criminal matters pursuant to the Constitution of the Republic in Article 96 thereof, since it does not require the legal rule to be criminal in order for it to be retroactive, since it is sufficient for it to favor the criminal or defendant in order for it to be applied in any criminal matter, as is in the case of Mr. McNab.

2) **Decision ["Acuerdo"] 0008-93:** Pursuant to the Legal Principles of Law, confirmed by Decree No. 198-2001, recently issued by the National Congress, the express repeal of a law makes the regulations issued by the Executive Branch to enforce the repealed law without value or effect, unless there is an express provision in the repealing law. Therefore, Decision ["Acuerdo"] 0008-93, issued to enforce the Meat Industrialization (Executive Decree No. 40 of May 16, 1973) was repealed in its entirety and rendered without any value or legal effect as of January 13, 1995, when the Plant and Animal Health Law went into effect (Decree 157-94), which repeals the aforesaid Meat Industrialization Law.

3) **Article 70 of the Fisheries Law:** This article, as amended by a Decree of the National Congress No. 245-

2000, rendered invalid and without legal effect the provisions originally contained in said article. Therefore, those provisions that were part of the original article and which were omitted in its amendment, ceased to have legal validity when Decree 245-2000 went into effect, among them, those contained in Items 3 and 7 of the original Article 70. Since those omissions benefit the defendant, their retroactive application in the criminal case brought against Mr. McNab is likewise guaranteed by Article 96 of the Constitution.

THIRD: Communicate to the officials of this Secretariat of State, by means of a circular, that rules not in effect must not be enforced nor must they alter the meaning and scope thereof;

FOURTH: Copy to the National Human Rights Commissioner and communicate by a Certification to the concerned party this Resolution, which contains the official position of this Secretariat of State in response to the Special Report with Recommendations of the National Human Rights Commissioner with regard to the contested acts that appear in the Affidavit rendered by Liliana Paz, Esq., and a copy of this report should be attached. LET THIS BE COMMUNICATED.

[signature]
GUILLERMO ALVARADO DOWNING
Secretary of State, of the Offices
of Agriculture and livestock

[signature]
LILIANA PATRICIA PAZ PAGUAGA
Secretary General

Tegucigalpa, Municipality of the Central District, on the sixteenth day of the month of November, two thousand one.

[There are two partially illegible impressions of a rubber stamp with a coat-of-arms in the center reading: "{illegible}

OFFICES OF AGRICULTURE AND LIVESTOCK, SECRETARY GENERAL, TEGUCIGALPA, HONDURAS, CENTRAL AMERICA".]

Boulevard Miraflors, Avenida La FAO, Tegucigalpa,
M.D.C., Honduras, Central America
Switchboard 232-8423, 232-6190; Fax 232-5375
Post Office Box 309

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on January 15, 2002, to the best of my ability.

Signed: /s/
Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

WITNESS my hand and official seal, this 15th day of January A.D. 2002

/s/
Notary Public
State of Florida

Frances R. Everidge
Notary Public, State of
Florida
My comm. expires Dec.
26, 2002
Comm. No. CC 897604

☐ Personally known to be.

☒ Produced the following identification

FL Drivers License

APPENDIX V

SAG SECRETARIAT OF AGRICULTURE AND LIVESTOCK

By producing more, we will preserve peace

CERTIFICATION

The undersigned Secretary General of the Secretariat of State, in the Offices of Agriculture and Livestock, CERTIFIES: The Resolution which reads verbatim, Secretariat of State in the Offices of Agriculture and Livestock, Tegucigalpa, Municipality of the Central District, on the fifteenth day of the month of November, 2001. **PREAMBLE:** To act on the Special Report with Recommendations, issued by the National Human Rights Commissioner, on the eighth day of November of the year two thousand one, related to the complaint filed by Mr. Steven Guillén, acting on behalf of Mr. David Henson McNab before the aforementioned Commissioner, because of considering that the Affidavit given by Liliana Paz P., Esq., on the tenth day of August of the year two thousand one, contains legal errors. **WHEREAS** the Legal Department of this Secretariat of State, after reviewing the facts alleged in the related report, considering in addition the decisions of the Courts of Administrative Law related to the case and after having made the relevant consultations, is of the opinion that what is set forth by the National Human Rights Commissioner in his report and in his Recommendations, is totally correct, so that he was of the opinion that the aforementioned recommendations be adopted, as well as the appropriate corrective measures; **WHEREAS**, in the Affidavit given by Ms. Paz P., in her capacity as Secretary General of this Secretariat, an error of law was incurred, according to the examination the National Human Rights Commissioner

made of the matter, based on the nation's laws and on international conventions and treaties signed and ratified by the Republic of Honduras; **WHEREAS**, according to Article 43 of the Organizational Law of the Human Rights Commissioner, this Secretariat of State is obligated to respond in writing to the Commission whatever obtains with regard to the Special Report with Recommendations issued by that national institution in charge of guaranteeing the effectiveness of the rights and freedoms recognized in the Constitution of the Republic and the International Treaties and Agreements ratified by Honduras; **WHEREAS** there are grounds for issuing the corresponding Resolution to give the answer required by the Law to the Recommendations of the National Human Rights Commissioner and to take the corrective measures under Law. Therefore, she **RESOLVES FIRST:** on the basis of the Special Report and Recommendations of the National Human Rights Commissioner, to disqualify as an error of law the Affidavit given by Liliana Paz P., Esq., on the tenth day of August of the year two thousand one, as well as any other statement contrary to what is set forth in this Resolution, inasmuch as it contradicts the Constitution of the Republic, the laws of the country, the international treaties and conventions and the principles of law. **SECOND:** The official position of this Secretariat of State, as well as the correct sense and scope of the challenged rules, is that set forth below: 1) **Resolution 030-95.** According to a decision of the Court of Administrative Law dated May 23, 2001, Resolution 030-95 and other resolutions were totally rendered null and void, but only for the purposes of making them null and void and inapplicable in the future. However, the final and firm judgment of the Appeals Court of that same Court dated October 11, 2001, expands the ruling by determining that the challenged Resolutions are null and void and, therefore, do not produce legal effects because of having been issued by an authority without jurisdiction erroneously and beyond the powers that the law grants to the issuer thereof. This is ow-

ing to the fact that they contain regulations and, since they had not been issued by the President of the Republic and authorized by the corresponding Secretary of State, **they never had the force of law** pursuant to what is set forth in the Constitution of the Republic, Articles 245, Number 11, and 248. The aforementioned decision of the Court of Administrative Law has a retroactive effect in criminal matters pursuant to the Constitution of the Republic in Article 96 thereof, since it does not require the legal rule to be criminal in order for it to be retroactive, since it is sufficient for it to favor the criminal or defendant in order for it to be applied in any criminal matter, as is in the case of Mr. McNab. **2) Decision ["Acuerdo"] 0008-93:** Pursuant to the Legal Principles of Law, confirmed by Decree No. 198-2001, recently issued by the National Congress, the express repeal of a law makes the regulations issued by the Executive Branch to enforce the repealed law without value or effect, unless there is an express provision in the repealing law. Therefore, Decision ["Acuerdo"] 0008-93, issued to enforce the Meat Industrialization Law (Executive Decree No. 40 of May 16, 1973) was repealed in its entirety and rendered without any value or legal effect as of January 13, 1995, when the Plant and Animal Health Law went into effect (Decree 157-94), which repeals the aforesaid Meat Industrialization Law. **3) Article 70 of the Fisheries Law:** This article, as amended by a Decree of the National Congress No. 245-2000, rendered invalid and without legal effect the provisions originally contained in said article. Therefore, those provisions that were part of the original article and which were omitted in its amendment, ceased to have legal validity when Decree 245-2000 went into effect, among them, those contained in Items 3 and 7 of the original Article 70. Since those omissions benefit the defendant, their retroactive application in the criminal case brought against Mr. McNab is likewise guaranteed by Article 96 of the Constitution. **THIRD:** Communicate to the officials of this Secretariat of State, by means of a circular, that

rules not in effect must not be enforced nor must they alter the meaning and scope thereof, **FOURTH:** Copy to the National Human Rights Commissioner and communicate by a Certification to the concerned party this Resolution, which contains the official position of this Secretariat of State in response to the Special Report with Recommendations of the National Human Rights Commissioner with regard to the contested acts that appear in the Affidavit rendered by Liliana Paz, Esq., and a copy of this report should be attached. LET THIS BE COMMUNICATED (signature) and seal GUILLERMO ALVARADO DOWNING, Secretary of State, of the Offices of Agriculture and Livestock (signature) and seal LILIANA PATRICIA PAZ PAGUAGA, Secretary General. It conforms to its original.

Tegucigalpa, Municipality of the Central District, on the Sixteenth Day of the month of November, two thousand one.

[illegible signature]
LILIANA PATRICIA PAZ PAGUAGA

Secretary General
[Partially illegible rubber stamp with a coat-of-arms in the center reading: "{ILLEGIBLE} OFFICES OF AGRICULTURE AND LIVESTOCK. SECRETARY GENERAL. TEGUCIGALPA, HONDURAS, CENTRAL AMERICA"]

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on November 17, 2001, to the best of my ability.

Signed: /s/

Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

Betty C. Martin
Commission # DD 036914
Expires August 4, 2005
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APPENDIX W

[Seal Omitted]

EMBAJADA DE HONDURAS

Washington, D.C.

DS/006/EITW/02

The Embassy of Honduras has the honor of presenting its compliments to the Department of State, and pursuant to instructions by the Ministry of Foreign Affairs, would like to forward documentation related to the case "United States of America vs. David Henson McNab" (Criminal Case No., 00-0079-CB USAO No. 99R00060). Mr. McNab, a Honduran national, is currently being detained in the Southern District of Alabama.

This documentation, which was submitted to the Ministry of Foreign Relations by the Ministry of Agriculture and Cattle Industry, (the agency that regulates the fishing industry in Honduras), clarifies the initial official position of that Ministry and finds that laws of Honduras were not violated by Mr. McNab. Since this information affects the basis of the legal case against Mr. McNab, the Embassy kindly requests that the documentation be submitted as soon as possible to the Department of Justice for its consideration.

The Embassy of Honduras avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., January 23, 2002

[Seal Omitted]

U.S. Department of State
Washington, D.C. 20520

APPENDIX X

CERTIFICATION OF ACCURACY

MARIA N. H. S. PAPP BEING DULY SWORN, DEPOSES AND SAYS AS FOLLOWS:

THAT I AM FLUENT IN BOTH THE ENGLISH AND SPANISH LANGUAGES.

I HEREBY CERTIFY THAT THE ATTACHED TRANSLATION INTO THE ENGLISH LANGUAGE OF THE DOCUMENTS ORIGINALLY IN THE SPANISH LANGUAGE, IS A TRUE AND COMPLETE TRANSLATION TO THE BEST OF MY KNOWLEDGE, ABILITY, AND BELIEF.

/s/

MARIA N. H. S. PAPP, INTERPRETER-TRANSLATOR.
51A NORTH CHURCH ST.
FAIRHOPE, ALABAMA

Subscribed and sworn to before me in my presence, this 5th day of July 2000, a Notary Public in and for the County of Mobile State of Alabama

/s/
(Signature) Notary Public
My commission expires March 23, 2003

TRANSLATOR'S NOTES

The translator has to be true to the original text, regardless if that text is correct or makes sense. In several places, however, the correct meaning could be inferred from the text. These places were marked with a *Note* giving the interpreter's understanding of the true meaning and not the literal translation.

Note 1. d) The products must be placed in such a way that a 30 cm (thirty centimeter) distance exists away from the wall and in between rows to allow for air circulation.

Note 2. The flour of 1st. quality . . . . . (the "1st" was omitted in the original text.)

Note 3. The last word of Article 104 obviously should have been "informes" meaning reports, rather than "uniformes" meaning uniforms.

THE GAZETTE

Official Newspaper of the Republic of Honduras

DEAN OF THE HONDURAN PRESS

Editor: Reporter Olman Ernesto Serrrano

No. 002003

YEAR CXVII TEGUCIGALPA, M. D. C. HONDURAS, WEDNESDAY APRIL 7. 1993 No. 27016

PRESIDENCY OF THE REPUBLIC

NATURAL RESOURCES

AGREEMENT No. 0008-93

TEGUCIGALPA, M. D. C. January 13, 1993

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NOTICE

THE PRESIDENT OF THE REPUBLIC,

WHEREAS: That it is the objective of the Government of the Republic to protect the health of the people and the national economy.

WHEREAS: That the fishing products due to their organoleptic characteristics and easiness of alteration in their composition, need a severe technological, hygienic and sanitary control in their processing.

WHEREAS: That fishing is the third most important product in the national economy.

WHEREAS: That it is the function of the State Department in the Office of Natural Resources the hygienic and sanitary normalization and their application through the Official Inspection on the elaboration and industrialization of the products of animal origin.

THEREFORE: In execution of the Decree-Law No. 40, dated May 16, 1973, which contains the Law of Industrialization of Meat, "AGREES: To issue the following "REGULATIONS FOR INDUSTRIAL AND HYGIENIC SANITARY INSPECTION OF FISHING PRODUCTS".

CHAPTER I
OBJECTIVES

Article 1st.—The present Regulations normalize the Industrial and Hygienic Sanitary Inspection of Fishing Products in the entire national territory.

Article 2nd.—The competent authority in the execution of the present Regulation is the General Administration of Livestock of the Department of Natural Resources, through the Department of Animal Health in the Section of Official Inspection of Products of Animal Origin. (SIOPOA).

Article 3d.—The ones subject to the Official Inspection are the fishing vessels, storing centers and plants that capture, gather, industrialize and pack fishing products.

In agreement with the present Regulation only the products previously inspected can be offered for sale.

Products for export can only be the ones processed in plants approved for that purpose.

Article 4th.—The fishing products that are subject to this Regulation are:

Fish, crustaceans, molluscs, anurous reptiles and mammals of comestible type, from fresh or salt water, assigned for internal consumption or export and by extension are also included the sub products obtained from the same mentioned products.

CHAPTER II
DEFINITIONS

Article 5th.—For the purpose of the present Regulation the following definitions are formulated:

a.—Fertilizer From Fishing Products: The sub product that does not conform to the specifications established for the flours of this products.

b.—Oil From Fishing Products: The liquid sub product obtained from the treatment of raw material by steam cooking, separated by decanting or centrifugation and filtration. Also is acceptable the treatment by simple pressing and decantation or by any other appropriate process.

c.—Cold Sea Water: The sea water whose temperature is 0 C (cero degree centigrades) or slightly inferior and with the same microbiological conditions that drinking water.

d.—Clean Sea Water: It is the one that has the same microbiological conditions that drinking water and it is free of undesirable substances.

e.—Broth From Fishing Products: The liquid product obtained by cooking the product with or without aromatic substances, packed and sterilized.

f.—Inventory Center: It is a place or building used to receive, to keep and distribute the fishing products.

g.—Contamination: The direct or indirect transmission of undesirable matter to the fishing products.

h.—Logbook: It is the notebook registered in the College of Veterinary Medicine of Honduras, and authorized by the Department of Natural Resources, in which the responsible

Veterinary Doctor of the approved establishment writes down the total activities and/or hygienic sanitary activities that take place at the plant.

i.—Derived From Fishing Products: The products and sub products, edible or not, totally or partially manufactured.

j.—Dehydration: It is the loss of liquids from the fishing products.

k.—Disinfecting: The application of chemical or physical agents with the purpose of eliminating the microorganisms.

l.—Approved Establishment: All storage place and processing plant, qualified by the Department to receive, process, pack and commercialize fishing products bound for exportat or internal consumption.

ll.—Fillet: Slice of fish of irregular size and shape separated from the body by cuts parallel to the spine.

m.—Glacial—Freezing: A thin protective layer of ice that is formed in the surface of a frozen product when sprayed or submerged in drinking water, added or not with other approved products by the Department.

n.—Flour Of Fishing Product: The sub product obtained by the cooking of the animals or their residuals by the use of steam, conveniently pressed, dried and ground.

ñ.—Inspection: It is a group of actions and proceedings of physical and anatomo-pathologycal nature that the Veterinary Doctor uses to examine and identify by sight, smell and touch the organoleptic state and condition of the fishing product.

o.—Official Inspection: Is the action of industrial and hygienic sanitary control in the establishments that process fishing products, executed by the General Administration of Livestock of Natural Resources, through the Department of Animal Health in their Section of Official Inspection of Products of Animal Origin.

The official inspection, will be made by collegiate Veterinary Doctors in complete use of their rights with the College of Veterinary Doctors of Honduras and authorized by the Department.

p.—Inspected and Approved: Indicates that the products or sub products marked with that legend can be commercialized.

q.—Inspected and Condemned: Indicates that the products or sub products marked with that legend must be destroyed or destined to (unknown).

r.—Cleaning: The suppression of all residual matter or objectionable impurity that is found on the equipment surface due to insufficient hygiene or cleanliness.

s.—Material Resistant To Corrosion: Waterproof material, non-toxic and resistant to sea water, to ice, mucus of the product, to oil or other corrosive substance with which the product can get in contact.

Their surface must be smooth and resistant to the repetitive action of cleaning products, including the chemical products approved by the Department.

t.—Packing Materials: All the materials such as sheets of aluminum, plastic, wax paper, cardboard boxes and others, used to cover and protect the fishing products, and that have been approved by the Department.

u.—Veterinary Doctor: The Veterinary Doctor possessing all his rights in the College of Veterinary Doctors of Honduras, contracted by the Department of Natural Resources in the position of Official Inspector and Delegate of the Department.

v.—V.D.: Veterinary Doctor.

w.—Paste Of Fishing Products: The product manufactured with the whole animal which after cooked, boneless and without fishbones is reduced to a mass, condimented with added flour or not.

x.—Glue Of Fishing Products: The sub product obtained by the processing of raw materials rich in collagenous substances (head, skin, skeleton, swimming bladder, etc.) by the steam cooking process or in boiling water and following conveniently concentrated.

y.—Fishing Vessels: Embarkations assigned to the capture of commercial fishing products.

z.—Processing Plant: It is the building or buildings, or part of them, vessels, ship factories; used for the processing and packing of fishing products destined for exportat or internal consumption.

a.a.—Freezing Process: The one that rapidly surpasses the temperature limits of maximum crystallization. The process of fast freezing must not be considered finished until the temperature of the product has not reached -18 C (minus eighteen degrees centigrade) in the center.

b.b.—Cooked Product: The product treated by heat until the proteins in its thermal center are coagulated.

c.c.—Frozen Product: The product treated by the adequate freezing process, to temperature no higher than -25 C (minus twenty five degrees centigrade).

d.d.—Cured Product: The one that it is elaborated with the whole fishing product and treated by special processes.

e.e.—Smoked Cured Product: The one that it is elaborated with the whole fishing product, through smoke with a prior cure in salt. (sodium chloride)

f.f.—Desiccated Cured Product: The fishing product that it is elaborated by natural or artificial desiccation.

g.g.—Dehydrated Cured Product: The one that it is elaborated with the whole fishing product, through deep desiccation in appropriate machines.

h.h.—Cured Product in Brine: The salty product when packed in brine.

i.i.—Compressed Cured Product: The one that it is elaborated with the whole compressed fishing product, conveniently cured by salt (sodium chloride).

j.j.—Salty Cured Product: The one that it is elaborated with the whole fishing product through the dry salting process or by brine.

k.k.—Dried Salty Cured Product: The one that it is elaborated by desiccation of the whole fishing product treated beforehand with salt (sodium chloride).

l.l.—Dried Cured Product: The one that it is elaborated through the appropriate desiccation of the whole fishing product.

ll.ll.—Breaded Product: The product totally covered by a coating of edible flour.

m.m.—Preserved Product "au naturel": The one with a liquid cover of a light brine, with or without aromatic substances.

n.n.—Preserved Product "in oil": The one with a liquid cover of olive oil, with or without aromatic substances.

ñ.ñ.—Preserved Product "in marinade": The one with the principal liquid cover of vinegar, with or without aromatic substances.

o.o.—Preserved Product "in sauce": The one with a liquid cover of sauce with a base of aqueous media or grease.

p.p.—Preserved Product "in white wine": The one with the principal liquid cover of white wine, with or without aromatic substances.

q.q.—Whole Product: The product as it was captured, without dressing.

r.r.—Fresh Product: The product that receives as conservation process only the effect of ice.

s.s.—Fishing Product: It is the species taken from the aquatic medium, destined to human and/or animal consumption or as raw material for the industry.

t.t.—Refrigerated Product: The product properly conditioned in ice and kept at temperatures between 0.5 C to -2 C (minus half degree centigrade to minus two degrees centigrade).

u.u.—Regulation: Regulation of Industrial and Hygienic Sanitary Inspection of Fishing Products.

v.v.—Detained: Product or part of a product, considered by the responsible Veterinary Doctor of the Department, to be subject to later inspection and that carries a specific mark for such purpose.

w.w.—Brine: A salty solution made of an edible quality salt (sodium chloride) in drinking water, that is used to preserve the product.

xx.—Department: State Department in the Office of Natural Resources.

y.y.—SIOPOA: Official Inspection Section of Products of Animal Origin.

z.z.—Non Edible Sub product of Fishing Products: It is all and any residue of a properly elaborated product, included in the denominations and specifications of this Regulations.

a.a.a.—Soluble Concentrate of Fishing Product: The product obtained in the appropriate machine by the evaporation and concentration of the part that is left after oil separation.

b.b.b.—Preservation Tune: The time that the product will keep all its inherent organoleptic characteristics, as well as the hygiene and nutritious quality.

c.c.c.—Viscera: Offal separated from the animal body to extend its useful life as an edible product.

CHAPTER III
OF COMPETENT PERSONNEL TO PERFORM THE INSPECTION

Article 6th.—It will be the official delegate the Veterinary Doctor of the Department and his counterpart, the responsible technician contracted by the establishments.

Article 7th.—The Chief Veterinary Doctor, of the Official Inspection Section of Products of Animal Origin will answer for the application of this Regulation and for the commitments acquired by the country for the application of the sanitary hygiene controls issued by the international food market.

Article 8th.—To be approved all the packing plants of fishing products must contract the services of a professional as the responsible Technician to be the person in charge of internally fulfilling the dispositions of the Regulations and the other dispositions of the SIOPOA

Article 9th.—The routine sanitary inspection done by the responsible Technician, inspector of the plant, must be coordinated with the Veterinary Doctor of the Department.

In case of conflict or opposite criteria, the decision of the Chief of the Official Inspection Section of Products of Animal Origin will take precedence.

Article 10.—The responsible Technician can count with assistants and aides for the adequate fulfillment of the duties of inspection and technic in all the cases, he will be the responsible technician responsible as such in front of the SIOPOA

Article 11.—To dismiss, remove, fire or suspend a responsible technician, the owner or plant manager must previously inform the chief of the SIOPOA so that an opinion can be emitted in the case.

Article 12.—The violation to the preceding article will result in the loss of the status of approved establishment.

Article 13.—The Department of Natural Resources will have to keep a record book of the responsible Technicians that carry out the operations at the registered establishments. Such record must have a personal file of each responsible technician.

Article 14.—The Department will only accept as responsible Technician of an establishment, the professional who is duty inscribed in the College of Veterinary Doctors of Honduras.

Article 15.—On evidence of anomalies in the performance of the responsible Technician or if he is not up to date with his union obligations, the Department will suspend temporarily or permanently his registration in the SIOPOA

In this case the certificates emitted by the professional will not be recognized.

In the preceding case the Department will recommend in a period of time no longer than 48 hours (forty eight working hours) the substitute.

Article 16.—The logbook of technical responsibility will be the most important form of communication of the Official Inspection of Products of Animal Origin with the establishment that will have total validity and legal efficacy.

Article 17.—It is the duty of the responsible Technician to send monthly to the SIOPOA the report on production, the quality control program and other relevant information.

The non fulfillment of the preceding without justification, will be considered a fault, and if repeated twice it will result in a summon that will go in his file.

If a third summon is accumulated the suspension will be final.

CHAPTER IV
OF THE REGISTRATION OF THE ESTABLISHMENTS

Article 18.—For the registration of a storage place or packing plant of fishing products, the interested party must present an application to the Department of Natural Resources, with the following information:

a) Name and nationality of the manufacturer, business person, industrialist or the natural or legal persons who act as proprietors or tenants of the establishment to be registered.

b) Location.

c) Type of activity to be dedicated to.

d) Declaration of the presumable volume of product to be worked.

e) Type of elaboration, place of obtainment of the raw material.

f) Declaration of the capacity of the daily operation of the product by day, during eight working hours.

g) Type of packing to be used.

h) Place, date and signature of the notifier.

Article 19.—The following must be attached to the petition:

a) An authenticated photo copy of the Deed of the Establishment of the company.

b) Operating permit approved by the General Administration of Fishing and Aquiculture. (DIGEPESCA).

c) Plans of the establishment and its descriptive notebook.

d) Plan that contains the whole land in reference to the place that the establishment occupies.

e) Location of the establishment.

f) Description of the entrance road, water courses, source and disposal of drinking water.

g) Plans of the sanitary installations, evacuation and disposal of contaminated waters location of plumbing and electrical equipment, and distribution of rooms for the different operations.

h) Destination of processing wastes.

i) Plans of ventilation system and natural and artificial lighting, expressing the lighting of working places in lux.

j) Plans on the characteristics of the construction of ceilings, walls and floors, refrigerating chambers, as well as the space and height of the working places.

All plans must be presented in the scale of 1:100.

k) Working contract and documents (copy) of the responsible Veterinary Doctor, who must be approved by the Department and start his duties at the moment the construction of the plant starts.

l) Chemical and bacteriological test of the water to be used to supply the establishment, dated no more than 15 (fifteen) days after it was done by a laboratory recognized by the Ministry of Public Health.

m) Official stamped first class white paper (3 sheets).

Article 20.—The establishment can only operate after inspection and approval for functioning and when it receives a number that accredits it as an authorized establishment.

Article 21.—The number of each establishment must always be used in the identification of the products elaborated that have favorably passed the inspection and approval.

There will not be more than one number assigned to each establishment and the numbers already used will not be repeated.

Article 22.—Any changes, extensions and/or remodeling planned for any of the installations of the authorized establishment, must be requested for approval in writing to the Department before the beginning of the work, at least 30 (thirty) working days in advance.

Article 23.—If the business pretends to close the activities temporarily or permanently, it must notify the Department 3 (three) months in advance.

CHAPTER V
OF THE INSPECTION

Article 24.—Only the establishments that keep within the hygienic-sanitary requirements outlined in this Regulations and which provide the necessary facilities for the inspection to take place can receive official inspection.

Article 25.—The Official Veterinary Doctors (M. V.) responsible for the inspection must inform immediately in a special format to the SIOPOA, all the anomalies, violations and non-observances detected during the inspection process, adding at the same time a photo copy of this report in their monthly notification, as it is mentioned in the Logbook.

Article 26.—The establishments will only be able to process the products for which they are officially registered.

Article 27.—The responsible Technician, his assistants and aides will have access through all the regular entrances and to all the areas of the establishment and its sites, during all hours of day or night.

Article 28.—Each plant must have obligatorily an internal regulation that specifies the technical activities inherent to their function and a good practices manual (G.M.P.'S).

CHAPTER VI
OF THE INSTALLATIONS OF THE PROCESSING ESTABLISHMENTS OF FISHING PRODUCTS

Article 29.—All establishment that process fishing products must have the rooms for receiving, handling and packaging of the products with the following characteristics:

a) White walls waterproofed with tiles or other materials approved by the SIOPOA to the minimum height of 2.5 m. (two and a half meters).

b) Floors of non slippery materials, of light color, without grooves, easy to clean, with adequate slope for good drainage, with small protected channels for drainage to restrain the entering of insects and rodents; and the joints between floor and wall rounded.

c) Minimum height of the room of 5m. (five meters).

d) Maximum room temperature of 18 C (eighteen grades centigrades) equivalent to 64.4 Fahrenheit, with wall thermometers in the control rooms.

e) The minimum illumination is of 220 lux (equivalent to 20 foot-candles) in the areas of normal work, and no less of 540 lux (equivalent to 50 foot-candles) in places where careful examination of the products will take place. All the lamps must have protectors.

f) All the exits and entries to the plant, mainly in the product storage area, must have an air curtain with the purpose of obstructing the entry of insects.

g) The tables, tanks, towels, sorter, scales or bascules or others must be of stainless steel or other non-corrosive and non-toxic material.

h) The ice carts, pannier, transportation boxes and others must be of plastic or other approved material.

Article 30.—The cooler chamber must have a temperature between -0.5 to -2 C (minus half degree centigrade to minus two degrees centigrade) with wall thermometers for control, doors with double safety bolt latch key, adequate illumination and drainage system with protection to obstruct the entry of insects and rodents.

Article 31.—The refrigeration chamber must have a temperature no higher to -25 C (minus twenty five degrees centigrade) with wall thermometers for control, doors with double safety bolt latch key and adequate illumination.

Article 32.—The storage room of the refrigerated product must have a temperature no higher than -15 C (minus fifteen degrees centigrade) with wall thermometer for control, door with double safety bolt latch key, adequate illumination, with wooden or metal stands with a minimum height from the floor of 10 cm. (ten centimeters).

Article 33.—The warehouse to store the packaging and chemical products individually, must have stands at 10 cm (ten centimeters) from the floor, have sufficient ventilation and adequate illumination. Also must have a warehouse to store utensils.

Article 34.—They must have separate bathrooms for men and women, in the following amounts:

a) Lavatory = 1 x 15 employees.

b) Urinal = 1 x 10 employees.

c) Toilet = 1 x 15 employees.

d) Shower = 1 x 15 employees.

Also, the lavatories must have liquid soap, paper towel or hand dryer and the toilet, toilet paper.

Article 35.—Each employee must have a locker with key to keep their personal effects.

Article 36.—The business must have a dinning room with adequate space, illumination and ventilation, with capacity for all the personnel.

Article 37.—It must include an office for the responsible Technician, with the respective sanitary installations and archives for the sanitary controls.

Article 38.—It must have as many offices as necessary for the administration.

Article 39.—A laboratory must be installed for routine quality control analysis.

Article 40.—All the windows have to be protected with a metallic fabric of fine mesh.

Article 41.—The areas of entry to the receiving and processing rooms must have a lavatory with foot pedal and a disinfectant solution to wash hands with chlorinated water at 25 ppm., as well as to wash feet with chlorinated water at 200 ppm.

Article 42.—At the entry to the cooler chambers there must be buckets with disinfectant solution to wash feet with chlorinated water at 200 ppm.

Article 43.—For the control of insects it is only permitted the use of pyrethrin base insecticides and for the control of rodents the well known baits can not be used.

CHAPTER VII
OF THE HANDLING AND THE SANITARY CONDITIONS OF THE EQUIPMENTS OF THE FISHING VESSELS

Article 44.—The equipment used by the fishing vessels must comply with the specifications as detailed, and for their operation they must comply with the following terms:

a) The fishing vessels will be planned so as to handle the product with speed and efficiency, to ease their cleaning and

disinfection and they will be made of such materials and shapes that will not damage or contaminate the product.

b) The tubs and bins must be made of a material resistant to corrosion.

c) The boxes or the panels must be easy to dismantle and they must have handles or hafts. The panels must have an opening when it is necessary, and a drainage slot in their lower brim

d) The holds or deposits (tubs and bins) of the product must be thermally insulated with the adequate material. All pipes and conduits that pass through the hold must be at ground level or in isolated boxes.

e) The areas designated for storing products must have an adequate drainage.

f) The coating of the holds or deposits for the product must be waterproof with a material resistant to corrosion and with sealed joints.

g) For the construction of shelves and vertical divisions for the storehouse of the product, they must make use of movable panels of corrosion resistant material.

h) The bins and iceboxes must be constructed in such a way that the maximum thickness of the layers of the product and ice will not exceed 1 m. (one meter).

i) When cooling coils are installed in the hold, they must be placed and made to work correctly.

j) Except in the case of stowing in sea water tanks or refrigerated brine, it is not recommended the stowing of the product in holds that are not divided in compartments. The holds of small vessels that transport the product must be furnished. with at least one longitudinal partition and one transversal, those partitions must be built of corrosion resistant material and be easy to clean and disinfect.

k) The holds that are not divided into compartments must have a sufficient number of drainage pipes installed at regular intervals throughout the hold and the waste must be discharged in a bilge or central sewer, it must also have vertical slots for drainage situated throughout the partitions of prow and aft and from outward deck to the sewer.

l) The hold for deposit must not have sharp or protruding edges that could impede the cleaning or could damage the product.

ll) The vessels can make use of clean sea water or refrigerated brine at a temperature close to 0 C (degrees centigrade) equivalent to 32 F, to store the catch.

m) In all the vessels that use sea water or refrigerated brine for the preserving of the product, the deposits, heat exchangers, pumps and the piping related to them must be of corrosion resistant material or must be coated with non-corrosive material. They must be built for easy cleaning and disinfecting.

n) The renewal of clean sea water or of the mixture of brine and ice used to cool and store the product, will be frequent.

ñ) The deposits of sea water or refrigerated brine will be definitely insulated with the appropriate material to reduce to the minimum the transmission of the surrounding heat.

o) The equipment for refrigeration and the one for the circulation of brine or sea water must be sufficient to keep the temperature of the product close to 0 C (cero degrees centigrade).

p) The places on the deck where the product is unloaded and handled, or the hold where the product is stored can only be used for these purposes.

q) Throughout the entire fishing vessel and in a sufficient number of specific places there must be an abundant supply of drinking water or cold sea water, clean and under pressure.

r) Chlorine must be injected when possible, in the sea water piping used in the elaboration of the product or for the cleaning of the vessel.

s) On deck there must be an abundant supply of clean sea water under pressure to wash it, for this purpose a pump must be used which will not be used for other purposes.

t) The ice that is used with the product will be made from drinking water and should not be contaminated when it is manufactured, handled or stored.

u) The discharges of the sanitary services, the pipes and all the conduits of waste evacuation, must be built in a manner and with materials that will not contaminate the product.

v) The vessels that use fodder or bait, must carry it in a manner that will not contaminate the containers to be used for the storing of the product.

w) All the fishing vessels must have a good amount of long-handled brooms, racquets, hoses, sprayers and other utensils for washing and disinfecting.

x) Poisonous substances, disinfectant soaps, plaguecides and others, must be stored in a separate place, exclusively reserved for that purpose.

y) All the equipment operated aboard of the fishing vessels to handle, transport and store the product, must be of fast and efficient functioning, of easy and complete cleaning and built in a way that would not contaminate the product.

z) The equipment employed to wash and transport the product must be easy to disassemble for the cleaning process and must have a chute or an analogous gadget to send the product to the hold. The chutes must have sufficient width and mounted in

such a way that the product does not fall more than one meter to the hold or ice box.

aa) The transporters that are used to move the product must be of material resistant to corrosion and be easy to dismantle and transport for cleaning.

ab) All the tubs and other recipients for the handling and transport of the product must be of materials resistant to corrosion.

ac) The factory vessels in which the product is being processed for export must comply with the established requirements for approved establishments.

ad) All the containers used for the storage of the product on ice must have an appropriate and uniform size, easy to handle when full to capacity and must be of material resistant to corrosion.

Article 45.—For the operations, the fishing vessels must comply with the following hygienic conditions:

a) Before the product arrives on board the vessel and in between each throw, all the equipment that gets in contact with the product, must be washed with clean sea water to remove all the dirtiness, mucosity and visible blood.

b) All the tubs, tanks, baskets and other equipment used for the operations of handling, innards removal, washing and transfer of the product must be perfectly clean, disinfected or rinsed after each operating cycle.

c) After each throw, the parts of the fishing equipment that enter in contact with the product must be left free of dead beings and organic matters. All the accessories or gears must be thoroughly cleaned after the fishing ended.

d) The water that had cooled the engines, condensers or similar equipment will not be used to wash the product, wash

the deck, hold or any other place that could get in contact with the product.

e) For the cleaning of the vessel in port, water with microbyologic conditions of drinking water must be used.

f) Immediately after unloading the product, the deck and all the equipment must be washed with water hoses, brushed, cleaned, disinfected and totally rinsed with a chemical cleaner previously approved by SIOPOA

g) Immediately after unloading the product, the hold must be completely emptied and also the supply of the bilge. All the surfaces of the hold, compartment panels and drain must be cleaned, disinfected and totally rinsed with a chemical cleaner previously approved by SIOPOA

h) On vessels that use sea water or refrigerated brine for the preservation of the product, all the tanks, pumps heat exchangers and other equipment must be cleaned immediately after unloading. Likewise they must circulate throughout the system drinking water or clean sea water that contains an adequate chemical cleaner in it. The tanks must be submitted to a careful inspection and if necessary, brush cleaning.

i) When tables for innards removal are installed, they must have conduits or channels in which continuously flows clean sea water or drinking water that carries the guts out off the carrier band or that would take it to an adequate container.

j) In the ice boxes where the product is kept, there should. never be stored provisions for the kitchen of the vessel or for the crews dinner.

k) Active and passive measurements must be taken to protect the fishing vessels against the entry of insects, rodents, birds, likewise for dogs, cats and other animals.

Article 46.—The catch on board must be handled in the following manner:

a) The duration of the trip of the fishing vessel is determined by its capacity to handle and maintain the product refrigerated, the distance to the processing establishment and the ambient conditions of the place.

b) The handling of the catch must begin as soon as it arrives on board. In catches designated for the export market the products that came together must be separated and kept separate.

c) No walking between or on the product, nor piling it up in large quantities on deck.

d) All the product that it is on deck must be protected against the action of the sun and the dessicatory effects of the wind.

e) The killing and bleeding of the product is done immediately after unloading on the deck, in water with ice at 0 C (cero degrees centigrade) in appropriate containers.

f) When it is not possible to immediately remove the innards, the whole product must be washed and refrigerated at the arrival on deck. The innards removal must be total and very carefully done.

g) Immediately after the innards removal, the product must be washed with clean sea water or cold drinking water; and all other posterior handling must be done immediately.

h) The hatchway must not be left open longer than it is necessary to load and unload the product.

i) The product must be placed in the hold by adequate methods.

j) The fresh product must be stored in layers of small thickness, maximum 20 cm. (twenty centimeters) of the product separated with alternate ice layers.

k) The product must be surrounded and covered with sufficient amounts of ice.

l) Ice must be used also to avoid the contact of the product with all the areas/surfaces of the hold.

m) Always must use ice broken in pieces or flaked to have good contact with the product.

n) The vessels that fish during more than one or two days must use a stowing plan.

Article 47.—Regulations for the unloading of the product:

a) It must be done with every precaution, without delays and in a storing center approved by SIOPOA.

b) At the end of each trip all the ice used must be thrown away before the beginning of cleaning.

c) Mixing of products from different days must be avoided during the unloading.

d) The product must not suffer any damage during the unloading.

e) If possible, use mechanical unloading equipment.

f) The stored products must be unloaded into clean containers, taken immediately to a covered place and kept with sufficient ice.

h) If the fishing vessels that use brine or refrigerated sea water are unloaded with pumps and shypons, the balancing water used for unloading must be at the same temperature and have the same hygienic quality of the original brine.

i) Each embarkation will have to prepare its own sanitary program (cleaning and disinfecting) for the vessel. Such program must be directed and supervised by the responsible Technician of each establishment.

CHAPTER VIII

OF THE FREEZING, STORING AND DEFROSTING OF THE PRODUCTS

Article 48.—For the freezing of the products it will be observed:

a) That the product is fresh and of good quality.

b) When methods of fast freezing are used the final product must not show signs of deformity, cracking, contusions and beatings.

c) When belt conveyers are used for transfer of the product in the freezers, it is necessary to adjust the speed of these in a way that the product is adequately frozen when it arrives to the other extreme of the freezing chamber.

d) The freezing can only be made in the freezing chamber.

e) During the freezing all kind of deformation of the blocks or containers must be avoided.

Article 49.—For the icing and packaging of the products it will be observed:

a) The frozen products must be iced, wrapped or packed to protect their quality during storing and commercialization for export as well as for internal consumption.

b) The products that are not packed, nor wrapped must be iced down after being taken out from the freezer.

c) Considere the icing process for shrimp an exception, which must be done prior to freezing.

d) For shrimp double icing no larger than 1/4" is permitted, placing later the product into individual packaging.

e) The temperature of the solutions (chlorinated water at 5 ppm must be used) used for the icing must not be higher than 5 C (five degrees centigrade).

f) The frozen products must be moved immediately to the storage chambers after being removed from the freezing chambers or from the icing.

g) The products in storage must be periodically examined to see that they have not suffered alterations.

h) The packaging must be made in boxes with the appropriate label, treated with paraffin and the size must have been approved during the registration process. They must have the following legend:

1st.—The name or trade name of the business that manufactured the product.

2nd.—The weight.

3d.—The legend "Product of Honduras" that can be also placed in another language.

4th.—A 3 (three) centimeter circle, "Inspected and Approved by the Department of Natural Resources of Honduras" and the number assigned to the establishment doing the processing.

5th.—In addition, it can have printed the different denominations of the size of the product.

i) The individual boxes can be crated in containers that have a minimum of 10 (ten) individual boxes, This crates must have the same information than the individual boxes.

Article 50.—For the storing of the product it will be observed:

a) Only the products that are completely frozen can be carried to the storage chamber.

b) The frozen products must be stored at -15 C (minus fifteen degrees centigrade) or lower temperatures, taking into consideration the species, kind of product and the expected time for storing.

c) The temperature in the storage chamber must be systematically controlled using forms that allow to register the date and the temperature.

d) The products must be placed in a space of 30 cm. (thirty centimeters), away from the wall and between rows to allow for air circulation. *Note 1*

e) The products must be stored in an organized manner, in such a way that allows to distribute first the ones with longer storage time.

Article 51.—For the defrosting of the products it will be observed:

a) That the defrosting method corresponds to the volume and type of the product to be processed.

b) All the defrosting operations must be done observing the best conditions for the handling of the equipment.

c) The fillets that had been frozen before or during the manifestation of "rigor mortis", must be defrosted at low temperature.

d) When the product is defrosted in still air, the room temperature must not be higher than 18 C (eighteen degrees centigrade).

e) During the defrosting by air circulation, the air must be humid and the temperature must not be higher than 21 C (twenty one degrees centigrade).

f) For the defrosting of the product in water, fresh drinking water must be used for the process at a temperature never higher than 21 C (twenty one degrees centigrade).

g) In the dielectric defrosting or by resistance to electricity, precautions must be taken to avoid an excessive warming of some parts of the product.

h) Immediately after being defrosted the product must be processed or kept refrigerated.

i) It is absolutely forbidden to refreeze a product after it was defrosted.

CHAPTER IX

OF THE SANITARY CONDITIONS OF A PROCESSING PLANT OF FISHING PRODUCTS

Article 52.—The establishments must comply with the following minimum sanitary conditions:

a) The places where the product is received and stored must be separated from the ones in which the product is processed and the final product is packed in such away that the final product can not be contaminated.

b) There must be a separate location or an adequate system to store the waste and to guarantee that the odors and insects will not contaminate the atmosphere.

c) The places for the processing of waste must be totally separated from the ones in which the product is processed for consumption.

d) In the whole establishment, and constantly during working hours, there must be in strategic places an abundant supply of drinking water at a sufficient constant pressure of 1.4 KG/ square centimeter and a maximum static head of 7 KG/ square centimeter.

e) The establishment must chlorinate the water in accordance with the minimum concentration for the projected use.

f) It must count with facilities for the manufacturing of ice with drinking water, with sufficient capacity to supply their needs. It must be manufactured, handled and stored without getting contaminated.

g) They must have storage tanks of drinking water that will guarantee a quantity of at least 25 L (twenty five liters) per kilogram of product to be processed.

h) The building, equipment, utensils and other means of the establishment must be kept clean, in good shape and maintained in orderly and sanitary conditions.

i) The tables and machinery used during the processing must be cleaned, washed and disinfected during breaks, meals and before resuming the processing and after all other work interruptions. On the working tables there must be drinking water available at a temperature no higher than 10 C (ten degrees centigrade) that must be chlorinated at 10 ppm (ten ppm).

j) The systems to pick up and evacuate the waste, must be below the level at which the product is elaborated, so that if splattering occurs the product will not be contaminated.

k) All the product that is trapped or accumulated in the machines or equipment must be periodically taken out during the working day.

l) The evacuation of solid, semisolid or liquid waste from places where the product is unloaded, stored and processed, must be a continuous or almost continuous process using chlorinated water and the necessary utensils to keep the places clean and so that no danger of product contamination could take place.

m) The personnel must always be carefully uniformed, clean and they must take all the necessary precautions to see that the product will no be contaminated by foreign objects. They must have a coat (gabacha ?), hair protectors, half mask, gloves, aprons and boots, white and of the type and materials approved by the Department of Natural Resources.

n) All the people contracted to work in the processing plants of fishing products must have a certificate or health card. Equally, any person who could be a carrier (any land of carrier) of infectious and/parasitary agents and who shows hand and arm lesions may not work in the processing of fishing products.

o) Before the beginning and at the end of every work day the establishment must be cleaned and disinfected.

CHAPTER X

OF THE HANDLING OF A PRODUCT IN A PROCESSING PLANT

Article 53.—At the arrival of the product at the processing plant it must be inside an appropriate clean box, with the product preserved in flaked or shredded ice, placed in alternating layers. The boxes must be transported in enclosed vehicles.

Article 54.—The whole product must be previously selected, washed with chlorinated water and iced to be transferred to the processing tables.

Article 55.—The whole elaboration process must be continuous, sanitary and with the product always protected with ice to be able to maintain their quality.

Article 56.—Additives can only be used on the products under prior authorization of the Department of Natural Resources and under the control of the responsible technician.

CHAPTER XI

OF THE CHARACTERISTICS OF THE PRODUCT AND OF THE WATER OF THE PROCESSING ESTABLISHMENTS OF FISHING PRODUCTS

Article 57.—The fresh fishing products must be considered appropriate for human consumption, the following organoleptic characteristics are presented:

a) Fish.

1st.—Clean body surface, with relative metallic shininess.

2nd.—Transparent, bright and protruding eyes, completely. covering the eye cavities.

3d.—Pink or red gills, humid and bright, with a natural color, inherent and soft.

4th.—Round and firm stomach, not leaving behind a permanent impression under a finger pressure.

5th.—Bright scales, well attached to the skin and fins presenting some resistance to a provoked movement.

6th.—Firm meat, elastic consistency and with the color appropriate to the species.

7th.—Whole viscera, perfectly differentiated.

8th.—Closed anus.

4th.—Specific odor reminding to that of marine plants.

b) Crustaceans.

1st.—General aspect shiny, humid.

2nd.—Natural curved body, rigid, firm and resistant articulations.

3th.—Shell well adhered to the body.

4th.—Appropriate coloration of the species, without any foreign pigmentation.

5th.—Vivid and prominent eyes.

6th.—Appropriate and soft odor.

c) Mollusks.

1st.—**Bivalves [marine]**

1st.—They must be sent to consumption live, with closed shells and with retention of colorless and clean water.

2nd.—Pronounced and pleasant odor.

3d.—Humid meat, well attached to the shell, spongy appearance.

b) **Cephalopod (octopus, squid]**

1st.—Smooth, compact skin.

2nd.—Vivid eyes, protruding from the eye cavity.

3d.—Firm meat of elastic consistency.

4th—Absence of any pigmentation foreign to the species.

5th—Appropriate odor.

The characteristics that this Article refers to, are extensive and applicable to other fishing products utilized for human food.

Article 58.—The physical and chemical characteristics for the characterization of a fresh product are:

1st.—Negative reaction of sulphidric gas and of indole, with the exception of the crustaceans in which the maximum limit of indole will be 25 (twenty five) milligrams per 100 (one hundred) grams.

2nd.—The ph of the external meat of fish must be lower than 6.8 (six point eight tenths) and the internal lower than 6.5 (six point five tenths).

3d.—Total volatile bases lower than 0.030 (thirty centigrams) of nitrogen (diffusion process) per 100g (one hundred grams) of meat.

4th.—Tertiary volatile bases lower than 0.004 g (four milligrams) per one hundred of nitrogen in 100 g (one hundred grams) of meat.

5th.—Trimethylamine at levels of 5 (five) to 10 (ten) milligrams per one hundred (100) grams of meat.

Article 59.—The products mist be free of microorganisms in quantities harmful to men, of pathogenic parasites and toxins harmful to human beings.

Article 60.—The products assigned to the export market, in addition to all the above mentioned standards, must maintain the standards defined and imposed by the importer.

Article 61.—The judgment of the sanitary condition of the refrigerated or frozen products must be done in accor-

dance with the rules for fresh products, in as much as they are applicable.

Article 6th.—They are considered improper for human consumption the products that present the following characteristics:

1st.—Repulsive appearance, mutilated, traumatized or deformed.

2nd.—Abnormal color, odor or taste.

3d.—Carrier of lesions or microbial illnesses that can affect the health of the consumer.

4th.—Presents a massive muscle infestation by parasites that may or may not affect the health of the consumer.

5th.—Treated by antiseptics or conserving agents not approved by the Department of Natural Resources.

6th.—Originating from contaminated or polluted waters.

7th.—Proceeding from fishing done in contravention to the laws in force or collected already dead, unless if it was captured during fishing operations.

8th.—In poor state of conservation.

9th.—Which is out of the physical and chemical limits established for fresh products.

The products in the conditions foreseen in this Article, must be condemned and transformed into sub products not for human consumption.

Article 63.—The water supply of the establishments processing fishing products must have the following chemical and microbiological characteristics:

a) Not to present in the global counting more than 500 (five hundred) germs per milliliter.

b) Not to show, in the presumptive test for the investigation of coliforms, a larger number of germs than the one fixed for the standards of 5 (five) positive tubes in the series of 10 ml (ten milliliters) and 5 (five) negative tubes in the series of 1 ml (one milliliter) and 0.01. ml. (one tenth of a milliliter) of sample.

c) The water must be clean, colorless, odorless, and with appropriate and pleasant flavor.

d) Not to have more than 500 (five hundred) parts per million of total solids.

e) To have at most 0.005g (five milligrams) per liter of ammonia nitrogen.

f) Absence of nitrous nitrogen and sulphidrics.

g) To have at most 0.002g (two milligrams) of nitric nitrogen per liter.

h) To have at most 0.002g (two milligrams) of organic matter per liter.

i) Degree of hardness lower than 250 ppm. (two hundred fifty parts per million) of total hardness, expressed as calcium carbonate.

j) Lead, less than 0.1 (one tenth) part per million.

k) Copper, less than 3 (three) parts per million.

1) Zinc, less than 15 (fifteen) parts per million.

m) Free chlorine, maximum of 1 ppm (one part per million), when dealing with chlorinated waters and residual chlorine a minimum of 0.05 (five hundredths) parts per million.

n) Arsenic, less than 0.05 (five hundredths) parts per million.

n) Fluorides, maximum of 1 (one) part per million.

o) Selenium, maximum of 0.05 (five hundredths) parts per million.

p) Magnesium, maximum of 0.03 (three hundredths) parts per million.

q) Sulfates, maximum of 0.10g (ten milligrams) per liter.

r) Phenolic components, maximum of 0.001 (one thousandth) parts per million.

When the water shows more than 500 (five hundred) germs per milliliter, it is necessary to have a new test of confirmation before it is condemned.

Likewise if the water is in accordance with the mentioned standards, new water treatment can be requested in accordance with the needs that could arise.

CHAPTER XII

OF THE DERIVATIVES FROM FISHING PRODUCTS

Article 64.—The fishing products can only be used in the elaboration of edible products after a previous sanitary inspection.

The raw materials used in the elaboration of the products must be examined as they enter the establishment, as well as the state of the brines, mixes, oils, etc.

The cleaning and removal of viscera of the fishing products used in the elaboration of processed products destined to human consumption is mandatory, whatever the technology used.

The responsible technician will not permit the use of any product that he considers not fit for processing.

Article 65.—The labels of the processed fishing products must show the name of the animal species, the added ingredients, the registration number of the establishment, the quality classification (if existent) plus other information that the Department may consider necessary.

Article 66.—The processed fishing products must be classified in accordance with their processing technology into;

a) Canned products, and;

b) Cured products.

Article 67.—Canned fishing product is the one manufactured with the whole animal, packed in airtight and sterilized containers, including in addition to others foreseen in this regulations, the following:

1st.—Au naturel.

2nd.—In edible oils.

3d.—In marinades.

4th.—In white wine.

5th.—In sauce.

Article 68.—The edible oils used by themselves or in mixtures with other ingredients, must be pure and have at most 2% (two per cent) of acidity in oleic acid.

It is accepted, in addition to the use of a unique type of oil, the mixture of several edible oils in the elaboration of canned fishing products, having to record on the labels depending on the case: "In edible oil and the type" or "In edible oils".

Article 69.—For the fishing products canned in a sauce, the principal ingredient that characterizes it must be present in a minimum proportion of 30% (thirty per cent).

Article 70.—The pastes of fishing products will be classified in accordance with their qualicuantitative composition into:

a) Extra.

b) First Quality.

c) Second Quality.

Article 71.—The paste of fishing products of "Extra" quality are the ones that have no flour added in their preparation, they can receive sodium chloride up to 18% (eighteen per cent).

Article 72.—The paste of fishing products of "First Quality" are the ones that have flour added during the preparation in a maximum amount of up to 10% (ten per cent) and sodium chloride up to 18% (eighteen per cent).

Article 73.—The paste of fishing products of "Second Quality" are the ones that have flour added during their preparation in a maximum amount of up to 15% (fifteen per cent) and sodium chloride up to 18% (eighteen per cent).

Article 74.—On the labels of the pastes of fishing products, there must appear the name of the animal species, the establishment number and the quality classification of the product.

Article 75.—The broth of fishing products can be additionated with other mixtures passing to the following denominations:

a) Soup of fishing products, when vegetables or pasta is added.

b) Jelly of fishing products, when edible gelatin is added.

c) Extract of fishing products, when the broth is concentrated to a paste consistency.

In the above mentioned mixtures, it may added to the type, the name of the fishing product used.

Article 76.—The fish eggs conveniently utilized may be used in the elaboration of "caviar" type preserves.

In addition to the inherent organoleptic properties the canned fish eggs must have the following specifications:

1st.—Not have more that 10% (ten per cent) of sodium chloride.

2nd.—Nitrogen titratable by formalin not to exceed of 0.05% (five centigrams per cent).

3d.—Not to give a reaction of free sulfhydric gas.

Article 77.—In addition to the canned products mentioned in this Regulation, the Department can authorize the processing of other kinds.

Article 78.—The containers for the canned products must be previously authorized by SIOPOA

Article 79.—The canned fishing products, submitted to sterilization, will only be released to the consumer after having been kept for at least 10 (ten) days in oven at 37 C (thirty seven degrees centigrades) at the conditions defined in the specific instructions.

Article 80.—The SIOPOA will condemn as fraudulent the canned fishing products that present the following characteristics:

1st.—When they are elaborated with animals different from the species declared on the labels.

2nd.—When they contain substances foreign to their composition.

3d.—When they show certain substances in higher amounts than permitted in the present Regulations.

Article 81.—The principal "Cured" fishing products are the following:

1st.—Salty Products.

2nd.—Compressed Products.

3d.—Smoked Products.

4th.—Dryed Products.

It is permitted the conditioning of these products in sealed containers, additioned or of aqueous or fatty medium, dispensing of the sterilization of the final product.

Article 82.—The preparation of salty fish product is permitted with a mixture of salt or brine with the addition of nitrate sugar and nitrate of sodium and condiments.

Article 83.—The minimum period for the cure of fishing products is 3 (three) weeks.

Article 84.—The compressed fishing products can not contain more than 45% (forty five per cent) of humidity and 8% (eight per cent) of fat.

Article 85.—For the preparation of smoked fishing products the cold or hot process can be used. Appropriate stoves must be used for this purpose, and to use for the burning of dry and hard woods without resins.

Article 86.—The dried fishing products include the following types:

1st.—Dry Salty Product.

2nd.—Dry Product.

3d.—Dehydrated Product.

When the desiccated fishing product contains a humidity level exceeding 35% (thirty five per cent) the product must be smoked.

The dry salty fishing product must not contain more than 35% (thirty five per cent) of humidity, nor more than 25% (twenty five per cent) of fixed mineral residue.

The dehydrated fishing product must not contain more than 5% (five per cent) of humidity and 3% (three per cent) of fixed mineral residue.

Article 87.—The cured fishing product must be considered altered when the following characteristics are present:

1st.—Unpleasant and abnormal odor and flavor.

2nd.—Soft, humid and clammy body.

3d.—With areas of abnormal coloration.

4th.—With larvae or parasites.

5th.—With other types of alterations in accordance with the ones detected by the responsible Technician or the official inspector of the Department.

Article 88.—For the breaded fishing products it is permitted that the layer of flour weigh a maximum of 65% (sixty five per cent) of the total weight of the product.

CHAPTER XIII

OF THE NON EDIBLE FISHING PRODUCTS

Article 89.—The residues from the handling of the fishing products, as well the condemned products, must be assigned to the preparation of non-edible products.

Article 90.—The following, in addition to others are considered non-edible sub products of fishing products.

1st.—Flour of fishing product.

2nd.—Oil of fishing product.

3d.—Glue of fishing product.

4th.—Fertilizer of fishing product

5th.—Soluble concentrate of fishing product.

Article 91.—For reasons of classification take into consideration two types of flours of fishing product:

1st.—Flour of fishing product of 1st. (first) quality.

2nd.—Flour of fishing product of 2nd. (second) quality.

The flour of quality must contain a minimum of 60% (sixty per cent) proteins, a *(Note 2)* maximum of 10% (ten per cent) humidity, a maximum of 8% (eight per cent) fats, a maximum

of 5% (five per cent) chlorides expressed as NaCL and a maximum of 3% (three per cent) sand.

The flour of 2nd. quality must contain a minimum of 40% (forty percent) of proteins, a maximum of 10% (ten per cent) humidity, a maximum of 10% (ten per cent) fats, a maximum of 10% (ten per cent) of chlorides expressed as NaCL and a maximum of 3% (three per cent) sand.

To obtain flour from the fishing product in addition to the techniques described in Article 6th. of this Regulation, it is also permitted the cooling and vacuum drying process or any other adequate process. It is also permitted the drying by simple exposure to the sun, provided there is no sanitary risk.

Article 92.—The oils from the fishing products must have the following characteristics:

a) Light yellow or amber yellow color, accepting the ones with a slight turbidity.

b) Maximum of 1% (one per cent) impurity.

c) Maximum of 10% (ten per cent) humidity.

d) Maximum of 3% (three per cent) of acidity in oleic acid.

e) Not to contain foreign substances, other vegetable oils.

Article 93.—It is permitted the utilization of "The Soluble Concentrate of Fishing Product" as raw material to be incorporated into the flour of fishing product or for industrial purposes.

The previously mentioned product must have a maximum of 30% (thirty per cent) protein, a maximum of 3% (three per cent) fats and a maximum of 10% (ten per cent) of humidity.

Article 94.—The registered establishments may manufacture other non-edible sub products, requesting always the previous authorization from the SIOPOA

Article 95th.—The non-edible sub products must be labeled in accordance with the requirements of this Regulation, declaring in the packing their composition.

CHAPTER XIV

OF THE RE INSPECTION OF THE PRODUCTS

Article 96.—All the products independently of their process of elaboration, even if they were already inspected and approved, must go through a re inspection by the Official Veterinary Doctors of the Department with the necessary frequency to verify that the product is in adequate condition for commercialization. If during the re inspection the opposite is determined, the trade mark, seal or original labels will be taken and destroyed and the product will be condemned but it could be reused as a sub product non-edible by humans.

Article 97.—The stored products must be systematically inspected, in case that the Veterinary Doctor finds any alteration or suspects of contamination, he must proceed to take samples for the pertinent analyses marking the rest of the lot with the label of "Retained for Re inspection".

Article 98.—The retention labels must be made by the business following a pattern defined by the Department.

Article 99.—After the pertinent analyses and in case of observing that the product is improper for commercialization, a label must be stamped with "Inspected and Condemned" with stamps made with indelible ink.

The product will be destroyed together with the mark, stamps and original labels, drawing up an act of destruction with 2 (two) witnesses.

Article 100.—In case that the product can be used as a sub product a label must be stamped with "approved for sub product". The original labels, stamps and marks must be immediately destroyed.

Article 101.—In case that the retained product is acceptable for commercialization the responsible technician or official veterinary doctor will remove the labels and the product will be released.

Article 102.—All the preceding situations presented here must be noted and communicated to the Department in a report and registered in the log book.

CHAPTER XV

OF THE REPORT OF INSPECTION

Article 103.—The reports related to the work of inspection done in each approved establishment must be sent monthly to SIOPOA, by the responsible Veterinary Doctors by means of corresponding copies of the log book.

The report must contain the quantity of products handled, processed, approved, exported, destined to internal consumption, condemned and the reason for it. In addition must include other details that could be considered relevant to be requested by the Department at a later time.

Article 104.—The administration of the approved establishments have the obligation to provide the responsible Veterinary Doctor with exact data on the affairs that they could need to rebuild their uniforms. *(Note 3)*

CHAPTER XVI

THE RECONSIDERATIONS AGAINST THE TECHNICAL DECISIONS OF THE RESPONSIBLE TECHNICIANS

Article 105.—The proprietor or manager of an establishment can request from the responsible Technician to reconsider a decision. He must decide if he maintains or modifies his decision.

Article 106.—In case that a responsible Technician maintains his decision, the proprietor or manager can request the

intervention of the chief of the SIOPOA who will definitively resolve the controversy, either keeping the responsible Technician's criteria or modifying it.

Article 107.—In case that there is a controversy based on laboratory results, the proprietor can request an analysis of the criteria adopted by the responsible Technician by means of a counter test that must be made in the same laboratory, using the same techniques, with a counter sample from the same lot, sealed at the same time of the one collected by the Official Veterinary Doctor responsible for the inspection. The proprietor must contract a professional in the same field that must work in unison with the same lab technician that signed the first test.

Article 108.—All the proceedings mentioned before must be made observing a process, that would be initiated with the request of reconsideration made by the proprietor to the responsible Technician and will end with the final judgment, which will be a collegiate opinion with the participation of the responsible Technician, the official Veterinary Doctor, the lab technician and the chief of SIOPOA

Article 109.—The Technical reconsiderations are independent of the recourses that are established by the Law of Administrative Proceedings.

CHAPTER XVII

OF THE SANITARY CERTIFICATES

Article 110.—All the products elaborated in a processing plant, will rewire for their commercialization, either for internal consumption or for export, the certificate of the College of Veterinary Doctors of Honduras, signed by the responsible Technician of the establishment and validated by the Department of Natural Resources.

Article 111.—The College of Veterinary Doctors of Honduras must emit specific certifications for the products of

animal origin, with an original, plus four copies, with consecutive serial numbers and data defined in conjunction with SIOPOA

Article 112.—The certificates that have errors, alterations in the writing, scratches and ink blots will be annulled.

All the derogated certificates must be returned with the appropriate explanation. The return will be immediate and the SIOPOA will be notified by means of a copy of the returned document.

CHAPTER XVIII

OF THE DEVOLUTION OF PRODUCTS

Article 113.—When an inspected and approved product and which has been taken out of the processing establishments, is considered adulterated, falsified, contaminated or has any other characteristic that makes it improper for commercialization, must be returned to the establishment accompanied with the original documentation in addition to all the information of the reasons for the rejection.

It is prohibited to carry a rejected product to another establishment that is not the original processor.

Article 114.—At the arrival of the product to the establishment the responsible Technician, will promote the inspection and if a fault is proven, he immediately will mark it "Inspected and condemned" and it will be disposed of in accordance with this Regulations. In case the product is acceptable for commercialization, the responsible Technician will allow receiving the product in the establishment.

Article 115.—The shipments of inspected and approved products that carry the label of inspection, can be assigned to a different place than the original without the need for re inspection, as long as it is assigned to the same country to which the original product was going to.

CHAPTER XIX

OF THE SANCTIONS

Article 116.—The infractions to the present regulations will be classified as light, less serious and serious fault.

Article 117.—Are considered light faults:

a) To be found for the first time, during the supervision with non compliance of up to two Articles of this Regulation that are not considered in the group of serious faults.

Article 118.—Are considered less serious faults:

a) To be found for the first time, during the supervision with non compliance of up to three Articles of this Regulation that are not considered in the group of serious faults.

Article 119.—Are considered serious faults:

a) The relapse into a light or less serious fault.

b) Not to maintain the conditions of hygiene in accordance with the rules.

c) Not to provide the responsible Technician with the necessary facilities for the carrying out of his function.

d) Not to correct the faults and not to promote the improvements stated in the log book by the responsible Technician.

e) To process products for which the business is not registered.

f) To obstruct the action of the SIOPOA inspectors.

g) To commercialize products not fit for consumption.

h) To commercialize fraudulent products.

i) In the case of export establishments, not to comply with the requirements of the importing market.

j) To destine for internal consumption the export products disqualified due to improper hygienic sanitary conditions.

k) Withholding information from the Department of Natural Resources regarding the field of animal health, or which due to their gravity could put at risk human health, or the economy of the country.

Article 120.—The fines applied for infraction of light faults are:

a) Written warning.

Article 121.—The fines applied for infraction of less serious faults are:

a) Written warning and the payment of 2,000 Lps. (two thousand lempiras).

Article 122.—The fines applied for infraction of serious faults are:

a) For the relapse of a light or less serious fault, a written warning and the payment of 10,000 Lps. (ten thousand lempiras).

b) Lack of maintenance of hygienic conditions, a written warning and the payment of 10,000 Lps. (ten thousand lempiras).

c) Not providing the responsible Technician with the necessary facilities, a written warning and the payment of 5,000 Lps. (five thousand lempiras).

d) Not correcting the faults and not promoting the improvements stated in the log book, written warning and the payment of 10,000 Lps. (ten thousand lempiras).

e) Processing products for which the business is not registered, written warning and the payment of 20,000 Lps. (twenty thousand lempiras).

f) Obstructing the action of the Department of Natural Resources, a written warning, payment of 10,000 Lps. (ten thousand lempiras), and if necessary closing the establishment for a period of 15 (fifteen) running days.

g) Commercializing a product not fit for consumption, written warning and the payment of 15,000 Lps. (fifteen thousand lempiras) and the publication of the business name in the press.

h) Commercializing fraudulent products, a written warning, the payment of 20,000 Lps. (twenty thousand lempiras), withdrawal of the entire lot of the product from the market and the publication of the business name in the press as a promoter of fraud.

i) Not complying with the previously established requirements of the import market, a written warning, payment of 20,000 Lps. (twenty thousand lempiras) and if necessary closing the establishment for 30 (thirty) running days.

j) Designating for internal consumption export products disqualified due to improper hygienic sanitary conditions, a written warning, payment of 20,000 Lps. (twenty thousand lempiras) and if necessary closing the establishment for 15 (fifteen) running days.

k) Omitting information from the Department of Natural Resources, a written warning, payment of 15,000 Lps. (fifteen thousand lempiras) and if necessary closing the establishment for 15 (fifteen) running days.

l) For the relapse into a serious fault, closing of the establishment for a period of 15 (fifteen) running days, plus the payment of 20,000 Lps. (twenty thousand lempiras).

m) In case of an export business, the relapse into a serious fault, in addition to that foreseen in clause k) will also result in the suspension of his permit to export for a period of 6 (six) months.

n) If a business relapses again for a second time in the same serious fault, the business will be closed for a period of 30 (thirty) running days, plus the payment of 25,000 Lps. (twenty five thousand lempiras).

o) In case of a business relapsing for the third time in-the same fault, the business will be permanently closed.

Article 123.—The whole process will be done in accordance with the. Law of Administrative Procedures.

CHAPTER XX

FINAL DISPOSITIONS

Article 124.—This Regulation will be in force from the date of publication in the Official Newspaper "The Gazette".

Article 125.—Make the transcriptions of Law.

GIVE NOTICE:

RAFAEL LEONARDO CALLEJAS ROMERO

Secretary of State in the Department of Natural Resources

MARIO NUFIO GAMERO

SAG

SECRETARIA DE AGRICULTURA Y GANADERIA

AUTENTICA

El suscrito Secretario General de la Secretaria de Estado en los Despachos de Agicultura y Ganadería CERTIFICA: Que las fotocopias que anteceden y contentivas de LA LEY DE PESCA (Decreto No. 154 de fecha 9 de junio de 1959); CAPITULO VIII. Congelamjentos, Almacenamiento y Descongelacíon los Productos (Acuerdo No. 0008-93 de fecha 13 de enero de 1993) y Resolución No. 030-95, de fecha 5 de diciembre de 1995, son AUTENTICAS por ser conformes a sus originales, de to cual DOY FE.

Tegucigalpa, M.D.C. 24 de febrero de 1999.

/s/

ILDEFONSO PAREDES H.
SECRETARIO GENERAL

[Seal Omitted]

APPENDIX Y

CERTIFICATE OF TRANSLATION

I, Paul W. Merriam, certify that I am competent to translate this document, and that the translation is true and accurate, to the best of my abilities.

English Title: Decree No. 154, Honduras Fisheries Law, dated 9 June 1959

Spanish Title: Decreto No. 154, Ley de Pesca de Honduras, de fecha 9 de junio de 1959.

I certify, under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the attached translation is true and correct.

Executed this 25th day
of September 2000.

/s/
Paul W. Merriam
Certified Translator for the
Spanish Language

ANTIQUARIAT LITERARY SERVICES, INC.
Member of the American Translators Association and National Association of Judicial Interpreters and Translators

* * * * *

[Note: Underlinings and strikeouts that appear in this text were done by hand in the source document. The pages are translated in the order of the articles, which differs slightly from the order of the page numbers.]

DECREE No. 154

THE NATIONAL CONGRESS
DECREES:

THE FOLLOWING FISHERIES LAW

CHAPTER I

GENERAL PROVISIONS

Article 1—The object of the Fisheries Law is the conservation, propagation, exploitation, marketing and industrialization of the nation's fluvial, lacustrine and maritime fauna and flora.

Article 2—Fishing comprises all activities aimed at extracting, owning, conserving or exploiting biological elements that normally live in the water, and, in general, the exploitation of these elements and all other acts related thereto.

Article 3—[illegible] species of fish, crustaceans, mollusks, mammals and reptiles [illegible] marine plants and all other species which comprise maritime, lacustrine and fluvial [illegible] fauna are declared to be property of the State, common ownership and for public use. They may be fished [illegible], exploited and marketed freely, by all [illegible] subject to the restrictions of this Law, Regulation [illegible] and other resolutions that may be announced, and may not [illegible], auctions, leases of any type [illegible] in all the waters of the sea, rivers, bays, harbors, inlets, [illegible], lakes, canals, adjacent cays and islands, etc. or in parte

[illegible] any individual or legal entity, involving privileges [illegible] common use law.

Article 4—In accordance with the purpose for which it is performed, fishing [illegible] in the following manner:

1.—For domestic consumption, when it is performed for the sole purpose of providing the nutritional needs of the person performing the fisheries activity or his family.

2.—For exploitation, when its purpose is to provide an economic benefit, through the alienation of specimens captured in any state. It is commercial when the specimens are the object of commercial transactions in their natural state, without any the interpretation of any process unrelated to the conservation of the specimens prior to the commercial transactions. It is industrial, when the captured species are subject to a total or partial transformation before they are sold.

3.—Sports-related, when it is performed for pleasure, entertainment or exercise.

4.—Scientific in nature, when it is performed for the purpose of obtaining specimens for study, research or for exhibition in aquariums or museums.

Article 5—The Executive Branch, through the Secretariat of Natural Resources, is the superior authority on fisheries and fisheries-related matters, and, therefore, may establish and announce the following measures through regulations:

1.—The procedures and requirements necessary for the exercise of fluvial, lacustrine and maritime fisheries.

2.—To set closed seasons, be they permanent or temporary, general or regional; reserved zones; and other conditions to ensure rational and methodical exploitation, from a biological, public health, commercial, industrial or sports point of view.

3.—To establish the form of fishing to be used, and its characteristics.

4.—To issue sanitation standards and any other provisions that may be necessary to regulate the fishing industry.

These functions shall be exercised by the Minister in this branch through the General Directorate for Natural Resources, in its Department for Hunting and Fishing, and with the cooperation to which Chapter IX refers.

Article 6—The Department of Hunting and Fishing has sufficient powers to suspend fishing for any species, when it is of such proportion as to cause fear that the species may be exhausted.

CHAPTER II

DEPARTMENT OF HUNTING AND FISHING

Article 7.—The Department of Hunting and Fishing has the following powers:

a) To conserve, promote and increase fluvial, lacustrine and maritime fauna and flora.

b) To establish fish hatcheries and mollusk beds in ponds, [illegible], streams, ravines, rivers, lagoons, lakes and suitable places in [illegible].

c) To enforce and cause enforcement of this Fisheries Law [illegible] and other provisions which may be announced.

d) To maintain a foliated record book of the licenses [illegible] of all fishing vessels.

e) To maintain also a record book of the registration of tackle to be used for fishing activities, such as nets, steel net elements, diving suits, oyster dredges, and trawls.

f) To issue identification cards to fishermen in general and to maintain a register of same.

g) It may establish, suspend and change closed seasons for places and species of fish, crustaceans, mollusks, chelonians or sponges, generally or locally, depending on the circumstances.

In cases of economic crisis, as an emergency measure; it may order the fishing, sale and transport of a given species during its closed season.

h) It also may grant authorization to capture manatee (Manatus americanus) specimens and chelonians for the exclusive use of scientific institutions.

It may also grant special permits to scientific corporations or members of these corporations, to traveling collectors and naturalists, to acquire species in closed season, be they fish, crustaceans, mollusks, chelonians or sponges, for the aforementioned purposes.

i) It shall also supervise all biology, boating, pisciculture or oyster raising establishments in order to ensure the greatest observance of, compliance with, and application of the provisions of this law, the regulations thereto, orders that may be adopted by the Department of Hunting and Fishing, and other resolutions that may be announced on the subject.

[Large handwritten X in left margin next to j) below]

j) It shall be the only authority to resolve, clarify and decide all questions raised about the conditions that must be satisfied by fisheries products, to permit them to be captured, transported or sold for consumption in the markets and for other industrial uses, and everything related to importation, exportation and licensing, to which end it shall announce such resolutions and other measures as it believes necessary for fisheries activities to be as effective s possible.

Article 8—It shall maintain the General Register of fishermen, ship owners, industrialists, dealers, and fisheries business persons; the register and seal for all nets, with exception of lobster traps and fishnets, equipment, machinery, diving

machinery and diving suits for fishing for sponges and mother-of-pearl or pearl oysters; it shall issue fishermen's identification cards, titles or certificates for diving fishing; it shall maintain statistics of all species that are fished. It shall be present at the unloading of all fisheries products, in order to verify whether regulatory provisions are satisfied or observed when they were caught; and it shall issue appropriate certificates in closed seasons, to ensure that species in containers meet legal requirements.

[Illegible handwritten note in the top righthand corner of the page.]

Article 9—Officials, employees and inspectors of the Department of Hunting and Fishing of the Ministry of Natural Resources shall be considered government agents for all legal purposes in the territorial waters of the Republic, river beds, beaches, docks, railroad stations, markets, and establishments for the storage , transport, refrigeration, or sale of fish, shellfish, sponges and other species under the protection of this law.

For such purposes, they may board and search any vessel, boat, hatchery, or storage facility for fish, sponges and other ocean and river species, businesses or places devoted to business, trade or industry in any of the species cited above, without need for prior orders, to inspect and ensure compliance with and observance of this law, the regulations thereto and other orders adopted by the Department.

Article 10.—The Department of Hunting and Fishing shall create the necessary positions to best develop the fisheries industry.

CHAPTER III

CONCESSIONS AND PERMITS

Article 11—The Executive Branch, through the Secretariat of Natural Resources, shall grant concessions and

permits for fishing for exploitation, fishing of a scientific nature, and sport fishing, in accordance with this Law and the Regulations thereto and the law of Concessions in effect, for a renewable period of no more than five (5) years.

Article 12—Concessions shall be granted to Honduran individuals or companies constituted in conformity with the laws of the nation, provided that they prove that they are financially able and that, because of the nature of their fisheries activities, they need more than two (2) years to become productive.

In no case shall rights be conferred which hinder or hamper fisheries for the domestic consumption of the inhabitants of the region.

Article 13—Concessionaires shall guarantee their obligations to the State with a bond in the form established by the Concessions Law.

Article 14—For concessionaires to continue to enjoy the concessions they have been granted, the construction necessary for the installation of refrigeration plants, warehouses, etc., involved in fisheries exploitation, must begin within a period of six months from the time the concession is approved by the National Congress.

Article 15—Fishermen legally organized in fishing cooperatives shall have priority to fish in areas in which more than half their members live.

Nevertheless, concessions may be granted to third parties in those areas, provided that the concessions are for species not exploited by the respective cooperatives.

Article 16—Cooperatives are exempt from the bond indicated in Article 13 of this Law.

Article 17—All concessions, except those which are granted to cooperatives, shall be non-exclusive in nature.

Article 18—Concessionaires that are not cooperatives may transfer their rights with the prior authorization of the Ministry of Natural Resources, provided that they are fully using these rights.

Article 19—The Secretariat of Natural Resources may grant permits to individual fishermen for a one-year term with no more than a report from the Department of Hunting and Fishing, in cases where the fishing is of a scientific or sports-related nature, and in cases not provided for in previous [articles of this Law].

CHAPTER IV

RIGHTS AND OBLIGATIONS OF FISHERMEN

Article 20—All Hondurans and foreigners residing in Honduras may fish freely for sport, domestic consumption or scientific purposes in territorial waters, rivers, lakes, etc., for public use. But for purposes of exploitation for profit, only resident Hondurans and Honduran legal entities in which Hondurans own at least fifty-one percent (51%) of the capital may obtain fishing permits or licenses.

Tourists who wish to fish for sport may do so in conformity with the prescriptions of this Law.

Article 21—Fishermen may make necessary use of ocean beaches for fishing, building cabins, bringing their boats and utensils and their catch to shore, drying their nets, etc., making certain, however, not to make use of the buildings or constructions there without permission of their owners, or to impede legitimate use by the other fishermen.

Article 22—They may also, for the stated activities, make use of the contiguous land up to a distance of fifty meters inland from high tide; but they shall not touch buildings or construction works within this distance, nor shall they cross fences or have access to groves, fields of crops or sown fields.

Article 23—The owners of land contiguous to the beach may not put up fences, buildings, or construction works, or plant crops within said fifty meters, unless they leave, at intervals sufficient, convenient spaces for fisheries needs.

Article 24—Fishing nets, with the exception of lobster traps and fish nets and auxiliary [equipment], must be sealed, registered, and have the appropriate license corresponding to their use or employment. No fees shall be charged for these licenses.

Article 25—Small vessels, such as kayaks, motorboats and [other] boats, whose capacity does not exceed three (3) net tons, are exempt from payment of the tax established in Article 33.

Article 26—Only Hondurans by birth may be employers or captains of fishing boats of any type.

Article 27—The fishing, sale, transport and exploitation of all species which do not have respective closed seasons expressly identified in the General Fisheries Regulation are authorized throughout the year.

Article 28—The sale and transport of species which are canned, salted, smoked or prepared industrial means, and were caught prior to the start of their respective closed seasons are also authorized at all times.

Article 29—Only vessels which display the Honduran flag may conduct fisheries activities in territorial waters.

Article 30—Fishermen shall be required to dock their vessels and unload their catch in Honduran ports; they may kill, freeze and load fish, crustaceans and mollusks and ship them to markets on all piers, both on private property and State, Departmental or Municipal property provided they have appropriate permission; but always being careful not to cause damages, and to clean the portion of the pier they used on the day they used it, in as little time as possible.

[Large handwritten X in right-hand margin next to text of Article 30.]

Article 31—To exercise the profession of fisherman of any species, one must be registered in the General Register of Fishermen which shall be maintained by the Department of Hunting and Fishing in the Ministry of Natural Resources, have a fisherman's identification card and the appropriate license for the vessel used.

Article 32—All vessels to be used for fishing in general must be registered in the manner required by the regulations to this Law, must obtain a license for it, and must use an identifying emblem.

Article 33—Taxes on licenses for all types of fishing vessels shall be paid based on the tonnage of the vessel at the rate of L 0.20 per ton or fraction thereof. This license shall be valid for one year.

[Handwritten note in righthand margin next to Article 33] *Rap L 20.00*

Article 34—Taxes paid by exporters of fisheries products shall be set by the National Congress.

Article 35 [circled by hand]—Businessmen, shipowners, employers, fishermen and sailors, as applicable to each business, boat, ship, or transport of each class dedicated to the fishing or transport of any of the species protected by this Law, are required to give to the respective officials an account or report, in writing, of the results of the fishing or fishing expedition, and to have the merchandise examined to verify whether regulatory requirements have been met, and to obtain the statistical data, and to allow their books to be reviewed.

Article 36 [circled by hand]—Industrialists, dealers, shipowners, warehousers and retailers, and other persons involved in the fishing industry, trade, traffic, or storage in general, are required to provide to the authorities designated by this Law

and the regulations thereto all information requested of them regarding their establishments, warehouses, refrigerators, hatcheries, boats, vessels, workshops, and other places used for the fisheries industry or trade in general, for the purpose of verifying whether the species meet all regulatory conditions.

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Article 37—All fishing boat captains shall report to the appropriate office when they depart for work and when they return, indicating fishing places, species and quantities caught.

Article 38—The catch of any vessel shall be unloaded in the corresponding national port, whether it is for domestic consumption, marketing, processing, packing or export.

Article 39—It shall be illegal for those who fish in rivers or lakes to make any use of the buildings or cultivated land on the riverbanks or lake shores, or to cross fences.

Article 40—Commercial or industrial permits or concessions to fish in national rivers may not be granted under any title.

CHAPTER V

CLOSED SEASONS

Article 41—Closed seasons for strawberries [sic] and spawning of mollusks and chelonians are fixed at one hundred twelve (112) lunar days; for fish, crustaceans and spongiform organisms, at eighty-four (84) lunar days. The closed season for fishing for shrimp and lobster is fixed as the period between 1 December and 30 April of each year.

Article 42—The Department of Hunting and Fishing shall produce the closed season calendar in accordance with the phases of the moon each year after consulting the national meteorological observatory.

Article 43—Closed seasons for each species protected by this law shall be announced for general information fifteen days prior to the start of said closed season, in order to have the desired effect.

All closed seasons must be observed strictly, and they may be altered only according to the provisions established by this Law.

Article 44—All closed seasons shall always contain prohibitions against fishing, transporting, selling, or storing live, dead, refrigerated or imported fish, crustaceans, mollusks, etc., and all species which are imported in periods other than closed seasons must necessarily meet the same conditions and regulatory requirements as domestic species, to which end all sales of imported fish, crustaceans, mollusks and ornamental fish must be authorized by the Department of Fisheries after they have been inspected by the corresponding official delegated by the Department, for purposes of identification and observance of the legal requirements.

If imported species do not meet regulatory requirements, they shall be confiscated.

Article 45—Fishing instruments, the legal size of the captured species and closed seasons will be the subject of the regulations for this law.

Article 46—Fishing is prohibited in places where fish are raised and reproduce, and where it could be detrimental to or interrupt navigation.

Article 47—It is prohibited to use in fisheries dynamite gunpowder, rock crushers, feet [sic], barbasco, carbide, lime, sulfur, chemical salts, acids and other spongiform organisms or sponge beds.

Article 48—It is prohibited to use small, immature fish as bait.

The following are legal bait: sardines, small sea bream, machuelo, lisera, hoqueron, chopa, jeniguanos, mantejueles, crustaceons, moluscs and other species without commercial value.

Article 49—It is strictly forbidden to chase, wound, harpoon, capture or fish for manatee (Manatus americanus), or to introduce their remains, skins, etc. into territorial waters. It is also prohibited to fish or exploit chelonians called turtles, or mollusks known by the name oysters, cascos de burro or curiles, on the Pacific Coast for five years.

Article 50—It is strictly forbidden to throw into the ocean, rivers, streams, lakes, lagoons or gullies, must, junk, syrup, industrial wastes or minerals of any type, such as those from stills, distilleries, liquor factories, refineries, rigging or rope factories, leather factories or processors, tanneries, laundries, storage facilities for syrups, petroleum or any other waste, substances or detritus that could cause harm to fish in general and fish farms in particular.

Article 51—No ship shall throw ashes, garbage, flushed waste from oil tanks, syrup, petroleum or any other kind of waste material into bays or harbors.

Said ashes, garbage, flushed waste from tanks of oils, syrups, petroleum or other materials shall be thrown into the water, at sea, at a distance of at least five miles from the coast.

Article 52—It is also prohibited to clear mangrove swamps and other woodlands on the banks of rivers and in the mouths of rivers, in canals, estuaries, lagoons, inlets, coves, seashores, cay shelters and other places which could serve to provide refuge or shade to fish and oysters.

Article 53—It is strictly forbidden to use harpoons, nooses, gaffs, hooks, spears, etc. to fish for chelonians.

Article 54—The transport and sale of species in closed season and the eggs of fish and chelonians, crustaceans and mollusks is permitted until the fifth day after the respective

closed season has begun for the purpose of selling off existing quantities which were captured prior to the start of said closed seasons.

After said five days from the start of the closed season of any species of fish, crustacean, mollusk or chelonian, any owner, administrator, or manager of a restaurant, hotel, inn, café, bar, guest house, market, fishmonger or any other place, who serves, sells or stores for his customers or clients species that are in closed season, be they live, dead or refrigerated, shall be considered to be in violation of this law.

Article 55—Only the eggs and live species of aquatic flora and fauna authorized by the Department of Hunting and Fishing may be imported and exported.

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CHAPTER VI

MEASURES FOR THE PROTECTION OF THE Fisheries INDUSTRY

Article 56—The Executive Branch shall give rights to import the following articles whenever they are not being produced or made in the country, provided that said dispensation does not affect industries whose promotion is deemed to be in the national interest:

1) Fishing vessels, implements and furnishings, machinery, equipment for vessels.

2) Machinery designed exclusively for the transport or industrialization of fisheries products.

3) All types of articles necessary for the industrialization of fish fauna.

4) Scientific material for carrying out studies or research related to this activity.

Article 57—Anything imported to the country which is protected by this law shall be exclusively for use in fisheries

activities and industrialization, and, should [any of said imports] be alienated or applied to other uses, the Secretariat of Economy and Treasury shall have the right to demand the immediate repayment of exempted taxes without prejudice to the ability to subject the party to the resulting responsibility in accordance with the laws of the nation.

Article 58—To be able to check the importation, a detailed list of the desired import, indicating the place of origin, name of the ship and port of arrival shall be presented to the Ministry of Natural Resources, for the purpose of having the Ministry of Economy and Treasury order the applicable person to grant the exemptions authorized by this law.

Article 59—The Executive Branch shall promote sport fishing for the purpose of encouraging tourism, and, to this end, it shall establish reserved zones dedicated exclusively to sport fishing. It may also grant sporting entities fishing reserves, with a prohibition against conducting commercial exploitation.

CHAPTER VII

PRIVATE, MUNICIPAL AND STATE HATCHERIES

Article 60—The Municipalities and the Central District Council, with the agreement of the Secretariat of Natural Resources, may allow public waters to be used to form lakes, pools or ponds to be used for fish hatcheries or beds, provided that it does not cause damage to public health or third parties.

Article 61—Hatcheries for fish or any other species enumerated in this law shall be authorized for a period of ten years, but if they are abandoned or are not worked for two years, the authorizations shall be ordered expired *ex officio*.

Article 62—When individuals or entities need breeders during closed seasons, they may obtain permits to fish for them from the Municipalities and from the Central District

Council. They can also obtain permits for eggs, embryos and fingerlings.

Article 63—The authorities shall provide to individuals who have hatcheries and request them, embryos of the species they wish to cultivate and propagate, as well as fingerlings that will serve to repopulate rivers, lakes, etc. or pairs of breeders of specific species or families.

Article 64—The Government reserves the right to have its representatives inspect private hatching establishments which raise, conserve or improve any species, for the purposes provided by this law and the owners of these establishments are required to supply the Government representatives as much background information as they request on the state of their industries and results achieved.

Article 65—The Municipalities and the Central District Council, provided that they are financially able to do so, are required to establish hatcheries in their jurisdictions for fish or any other species that lives in the water, to watch over their conservation and attend to their propagation according to the instructions they receive from the Ministry of Natural Resources or its offices specialized in their area.

Article 66—The Ministry of Natural Resources shall order the formation of State hatcheries in the places that the Department of Hunting and Fishing, which is dependent on the General Directorate of Natural Resources, deems appropriate, establishing seed beds or model parks, designed to promote and teach about pisciculture and beds for other shellfish.

Article 67—The obligations and rights of fish farms are enumerated in the regulations.

Article 68—The Secretariat of Natural Resources is responsible for the supreme inspection of all fish farms, and shall exercise this responsibility through its representatives.

CHAPTER VIII

CRIMINAL PROVISIONS

Article 69—Violations of the manatee closed season shall be punished with a fine of TWO HUNDRED LEMPIRAS or TWO HUNDRED DAYS imprisonment.

Article 70—The following offenses shall be punished with [a fine of] THREE HUNDRED LEMPIRAS or THREE HUNDRED DAYS imprisonment:

1) Those who use [any of the following] for fishing: dynamite, gunpowder, explosives, carbides, sulfur, line or chemical salts of any kind.

2) Those who throw must, junk, syrups, acids, industrial wastes or minerals, drainage from the manufacture of rigging or rope, leather processing plants, leather tanneries, distilleries, stills into the ocean, rivers, streams, lakes, lagoons, or allowing them to run or filter to those places or to channel to them in any way, or who wash the tanks of steamships or oil tankers, oil processors, syrup processors, or who throw ashes or garbage into bays, harbors, etc. or places less than five miles from the coast.

3) Those who destroy or harvest the eggs, or the offspring of fish, chelonians or other aquatic species for profit.

4) Those who catch, transport or sell fish, crustaceans, mollusks or chelonians during their respective closed seasons.

5) Those who use nets for fishing which do not have meet the regulations for mesh measurements, dimensions or other requirements.

With regard to fishnets, nets and trammels, in addition to the indicated penalty, all illegal nets shall be ~~distributed~~ *destroyed.*

6) Those who clear mangrove swamps or other woodlands on the seashore, riverbanks or other places which serve to

shelter fish in general and oysters in particular, except when permission has been granted to exploit or industrialize trees or other plants.

7) Those who catch fish, crustaceans or chelonians of a lower weight, size or dimension than that provided by regulation.

8) Those who violate the provisions regarding labeling of containers of canned fish, crustaceans, etc., that do not state the contents with their correct name.

9) Those who harpoon unusable chelonians or other species, [which offense] shall constitute cruelty.

10) Those who serve in their establishments, guest houses, hotels, restaurants, bars, or cafes, or who store in warehouses or in any other manner in their possession, fish, crustaceans, mollusks, etc., be they live, dead or refrigerated, in closed season, or who commit offenses of size, weight, or dimensions lower than those required by the General Regulation of Fisheries.

11) Those who catch a quantity too large to be transported in their own vessels, hatcheries, storage facilities, etc.

[Large handwritten X to the left of the numeral 12)]

12) Those who use fishing vessels or nets that are unlicensed, unregistered or which do not have seals, as well as those who do not have a certificate or title to dive for fish, a fisherman's identification card, pennants or emblems on fishing boats, industrial licenses for businessmen, vendors commission agents warehousers refrigerators, retailers, or [licenses] for any other fisheries business in general, and those who use small, immature fish as bait.

13) Those who use fishing vessels or nets that are unlicensed, unregistered or which do not have seals, as well as fishermen who do not carry their identification cards or who

do not use on their vessels the emblems referenced in Article 32 of this Law.

Article 71—A shipowner or owner of a boat who does not unload the catch removed from the nation's jurisdictional waters for the purposes referenced in Article 30 of this Law shall be punished with a fine of FIVE THOUSAND LEMPIRAS or seizure of the ship.

Article 72—The following shall be personally responsible for all infractions: The shipowner, employer, worker, crew member, sailor, fisherman, businessman, industrialist, dealer, recipient, vendor, auctioneer, retailer, landlord, warehouser, refrigerator operator, or any person who has in his possession a prohibited species which is in closed season, or which does not have the required size, weight, or dimensions for it to be fished, sold, transported or exploited.

This provision shall also be applicable to types of fishing in which the provisions of law are violated.

Article 73—Other infractions of this law, the Regulations for its execution, orders adopted by the Department of Hunting and Fishing, and other legal provisions, shall be punished based on the seriousness of the infraction and in relation to the penalties indicated above.

Article 74—The Department of Hunting and Fishing and the General Directorate of Customs shall be organizations with sufficient powers to apply the fines referenced in the previous articles.

Article 75—Foreign fishing vessels that are surprised fishing in Honduran waters, without satisfying the requirements of this Law and the Regulations thereto, shall be detained to ensure payment of the fine which may be imposed, which shall, in no case, be less than . . . . . (L 10,000.00) TEN THOUSAND LEMPIRAS, and the fishing equipment and product found on board shall be confiscated.

Article 76—In those cases in which the fine is not paid, the punishment by imprisonment referenced in this Chapter shall be imposed by the appropriate authority, according to normal procedure.

CHAPTER IX

COOPERATION OF OTHER STATE SECRETARIATS

Article 77—The Ministry of Economy and Treasury, through the Merchant Marine Section, shall cooperate with the Ministry of Natural Resources, to arrange appropriate surveillance to ensure strict compliance with the obligations and prohibitions contained in this Law and the Regulations thereto, and in the National Merchant Marine Law.

Article 78—The Ministry of Public Health, through the General Directorate of Public Health, shall control the hygiene aspect of the fisheries industry, which shall comprise both the storage and handling of fisheries products on board the vessels, and the transport, distribution and sale of same.

All persons devoted to fisheries, as well as those devoted to the transport, distribution and sale of fisheries products, shall be required to comply with all the public health standards and such other requirements as the General Directorate of Public Health may establish.

Article 78—Defense, Economy ~~(and Treasury)~~, and Public Health authorities shall coordinate their activities with the Ministry of Natural Resources to ensure that this Law and the Regulations thereto are applied in a manner that ensures the growth and health of the industry and respect for National Sovereignty. To this end, they must:

1) Lend immediate collaboration, as mutually requested in the various aspects that fall within their respective jurisdictions.

2) Maintain contact among themselves, through Representatives, Inspectors, Armed Personnel or any other subor-

dinate personnel, whether by correspondence or through personal statements.

3) Inspect jointly, as required by the situation, books, statistical notebooks, offices, storage facilities, vessels, etc., that belong to individuals or legal entities that are devoted to fisheries, or are involved in any way with the fisheries industry.

4) Any conflicts which may arise between individuals, companies or municipalities, with regard to the application of this law, shall be resolved by the Department of Hunting and Fishing.

Article 81—Concessions or permits granted prior to the effective date of this law, shall be considered to be fully expired, and interested parties shall be required to present new applications, which will be subject to the provisions of this law.

Article 82—This Decree shall become effective on the date it is published in the Official Gazette *"La Gaceta."*

Delivered in the Assembly Room of the National Congress, in Tegucigalpa, D.C., on the nineteenth day of the month of May nineteen fifty nine.

MODESTO RODAS ALVARADO [illegible]
President

MIGUEL ALFONSO CUBERO	CARLOS MANUEL ARITA
Secretary	Secretary

TO THE EXECUTIVE BRANCH

THEREFORE: BE SO EXECUTED.

Tegucigalpa, D.C., 9 June 1959.

RAMON VILLEDA MORALES

State Secretary with the Portfolio for Natural Resources,

M. Lardizábal Galindo

* * * * *

APPENDIX Z

STATE OFFICE OF THE DEPARTMENT OF NATURAL RESOURCES

REPUBLIC OF HONDURAS

From the desk of the Secretary

RESOLUTION N. 030-95

The Department of Natural Resources and the Department of Fishing and Aquiculture.

CONSIDERING: That the protection and preservation of Natural Resources is the duty of the State and an unavoidable obligation of all citizens.

CONSIDERING: That the Executive Power through the Department of Natural Resources and its specialized departments, is the principal authority in issues dealing with fishing activities and any other activity related to it.

CONSIDERING: Catching fish, shrimp, lobster and snails in the Atlantic Ocean is very important for the national economy.

CONSIDERING: The establishment of closed seasons is a very important mechanism for the survival of species and will also create an ecological equilibrium.

THEREFORE

Using its authority and the application of Articles I, 5, 2nd numeral, and literal 7 "g" of the Fishing Law.

RESOLVES:

First To establish a closed season every year when dealing with shrimp, lobster and snails and related species in the Atlantic Ocean and in any waterways along the coast during the following dates::

a) Shrimp from the 1st of February to the 30th of June.

b) Lobster from the 16th of March to the 31st of July.

c) Snails from the 16th of March to the 30th of August.

Second: All dragging nets used by shrimp boats must carry the device for the exclusion of turtles (TDE), to guarantee the survival of this species.

Third: For the capture of lobster.

a) the traps will be made of wooden slats, except the top and bottom which will be one solid piece. The space between slats and the bottom must be at least 2 and 1/4 inches.

b) Fishing boats which engage in diving activities should have the right diving equipment such as pressure gauges, oxygen tanks, regulators, masks, fins, everything in excellent condition, as well as the compressors and filters, all should be in excellent condition before setting out to sea.

c) Captains of diving boats will take a required course "Security regulations for

Diving and the Environment" just before the beginning of each fishing year.

d) The minimum size to keep a lobster should be 5.5 inches or 14.5 centimeters of abdominal length.

e) The devices to measure the length of lobsters are obligatory on each vessel which carry out this fishing activity.

Fourth: The minimum size to keep snails (Strombus gigas) is 22 centimeters from the posterior channel to the siphonal channel.

Fifth: Infractions of the present Law will carry out a penalty as stipulated by the Fishing Law.

Sixth: This Resolution must be made public.

Tegucigalpa, Central District Municipality, the 5th of December of 1995.

LET IT BE KNOWN

RESOLUTION N. 030-95

RAMON VILLEDA BERMUDES
Minister

MARCO POLO MICHELETTI
General Director of DIGEPESCA

APPENDIX AA

LA GACETA
(Gazette or Newsletter)

Official Newspaper of the Republic of Honduras

Publisher: Licenciado (*A person with the equivalent of a Masters Degree*) Juan Ramón Duran

Tegucigalpa, M.D.C. (*Central Municipal District*) Honduras, Friday, January 13, 1995 Number 27,552

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LEGISLATIVE POWER

DECREE Number 157-94

National Congress

WHEREAS: It is the duty of the State, to watch over and promote the preservation of the national agricultural patrimony by means of the enactment of judicial ordinances and other norms that contribute to this goal.

WHEREAS: The protection of the environment, of natural resources, and human health are closely related to the activi-

ties that are developing in the agricultural sector and particularly to the preventive measures, the control and eradication of plagues and diseases in plants and animals that affect national production.

WHEREAS: The modernization and reconciliation of the phyto and zoosanitary laws and norms, are indispensable requirements for the promotion of technological and informational development and are basic elements of the regional integrative process.

WHEREAS: The processes of economic reactivation and regional integration demand modernization on the State level, in its phyto and zoosanitary organization and structure, in order to attend to the demands of the aperture in International Agricultural Commerce, without diminishing plant and animal safety.

WHEREAS: The preservation of the species through the protection of fauna and flora is an indispensable condition for the maintenance of ecological equilibrium of the Honduran nation

WHEREAS: It corresponds to the Secretary of State at the Office of Natural Resources to define and execute the policies for the agricultural sector.

THEREFORE

DECREES

The following:

PHYTO ZOOSANITARY LAW

FIRST TITLE

GENERAL ORDINANCES

CHAPTER I

OF THE LAW'S OBJECTIVE

Article 1.—This Law has as its goal to watch over the protection and health of plants and animals and over the con-

servation of its products and byproducts, against the harmful act of plagues and diseases that bear economic, quarantine, and human importance.

Article 2.—In order to fulfill the objectives of this Law, the Secretary of Natural Resources, hereinafter SRN, will focus his efforts to strengthen the phytozoosanitation, mainly in that which refers to the diagnosis and epidemiologic vigilance, agricultural quarantine, the control of agricultural inputs, control of products that are of animal and plant origin, the programs and campaign to control and/or eradicate plagues and diseases, the accreditation of professionals and companies for phyto-zoosanitary programs, and the mechanisms for national and international reconciliation and coordination.

* * * * *

CHAPTER NINE
OF THE FINAL AND PROVISIONAL ORDINANCES
ONLY CHAPTER
OF THE FINAL AND PROVISIONAL ORDINANCES

Article 42.—The Law of Plant Health (Decree No. 23, of January 31, 1962), the Law for the Manufacturing and Commercialization of Concentrated Feed for animal use (Decree No. 91, November 24, 1969), the Law for the Industrialization of Meats (Decree Law No. 40, May 16, 1973, and the Law of Animal Health (Decree Law No. 156, November 18, 1974, are repealed.

Article 43.—The Executive Power by means of the Secretary of State in the Office of Natural Resources will issue the rules of this Law, within a time limit not greater than ninety (90) calendar days, counted from the date that this decree takes effect.

Article 44.—This Law will take effect on the date of its publication in the Diario Oficial La Gaceta.

Given in the city of Tegucigalpa, Municipality of the Central District, in the Sessions Hall of the National Congress on the fourth day of the month of November of nineteen hundred and ninety four.

CARLOS ROBERTO FLORES FACUSSE
PRESIDENT

ROBERTO MICHELETTI BAIN
Secretary

SALOMON SORTO DEL CID
Secretary

To the Executive Power

SALOMON SORTO DEL CID

Therefore: Execute

Tegucigalpa, D.C. November 15, 1994
CARLOS ROBERTO REINA IDIAQUEZ
Constitutional President of the Republic

The Secretary of State in the Office of Natural Resources
Ramón Adolfo Villeda Bermúdez

---

* * * * *

APPENDIX BB

[coat-of-arms]
National Congress
Republic of Honduras, Central America

DECREE No. 198-2001

THE NATIONAL CONGRESS,

WHEREAS Article 43 of the Civil Code has been the object of questions and confusion in its application with regard to effectiveness and effects of the regulations of the laws repealed by others subsequently passed by the National Congress on the same matters.

WHEREAS it is advisable and necessary to clearly set forth by means of the authentic interpretation by the Legislature the validity of the regulations for the enforcement of the laws in those cases in which the latter have been repealed by other laws that deal with the same subject.

WHEREAS, pursuant to Article 205, item 1), of the Constitution of the Republic, the National Congress has, among other powers, the power to interpret the laws of the Republic;

THEREFORE,

[PAGE 2:]

DECREES:

ARTICLE 1. That Article 43 of the Civil Code be interpreted to the effect that the express total or partial repeal of a law leaves without legal value or effect the general regulations and the specific regulations totally or in that part referring to the reformed article or articles,

where the reform is partial, that the Executive Branch through the respective Secretariat of State has issued to implement the provisions of the repealed Law, unless there is an express provision to the contrary in the new repealing Law.

ARTICLE 2. This Decree shall go into effect on the date it is published in the Official Journal *La Gaceta*.

[Page 3:]

[coat-of-arms]
National Congress
Republic of Honduras, Central America
DECREE No. 198-2001

DECREE No. 198-2001

Given in the City of Tegucigalpa, Municipality of the Central District, in the Meeting Hall of the National Congress, on the first day of November, two thousand one.

[Three impressions of a rubber stamp reading: "NATIONAL CONGRESS. {illegible} TEGUCIGALPA, M.D.C.".]

[illegible signature]
RAFAEL PINEDA PONCE
SPEAKER

[illegible signature]	[illegible signature]
JOSÉ [illegible]	**ROLANDO CÁRDENAS**
HERNÁNDEZ CÓRDOVA	**PAZ**
SECRETARY	**SECRETARY**

To the Executive Branch.
Therefore: Let it be executed.
Tegucigalpa, M.D.C., November 30, 2001

[illegible signature]
CARLOS ROBERTO FLORES FACUSSE
CONSTITUTIONAL PRESIDENT OF THE REPUBLIC.

[illegible signature]
THE SECRETARY OF STATE IN THE OFFICES OF INTERIOR AND JUSTICE.

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I translated the attached documents from Spanish into English on January 11, 2002, to the best of my ability.

Signed: /s/
Paul R. Sadur, M.A.
ATA Accredited Translator
Federally Certified Interpreter

[Handwritten:] SUBSCRIBED BEFORE ME, A NOTARY PUBLIC, BY PAUL R. SADUR THIS 11TH DAY OF JANUARY, 2002, WHO PRESENTED A FLORIDA DL AS IDENTIFICATION.

/s/
Notary Public

Harry D. Burnett
Notary Public, State of Florida
My Comm. Exp. 5/4/04
No. CC 910134
[] Personally Known [X] Other I.D.

APPENDIX CC

Decree No. 245-2000

The National Congress,

WHEREAS the General Law of the Public Administration defines the areas of authority of the Secretariat of State in the Offices of Agriculture and Livestock, among which is included that which concerns the enforcement of the policies related to fishing, aquiculture and the protection of our hydrobiological resources;

WHEREAS the current Fishery Law, contained in Decree No. 154 dated May 19, 1959, sets forth sanctions of an administrative nature, the amounts whereof do not represent coercive measures that reflect the gravity of the violations committed, so that it is necessary to revise said sanctions according to the importance of the case and the current value of the national currency;

WHEREAS it is the duty of the State to ensure compliance with the fishery regulations in order to contribute with the sustainable yield of our hydrobiological species;

Therefore,

DECREE:

Article 1. Amend Article 70 of the Fishery Law, contained in Decree No. 154, dated May 19, 1959, which hereafter must read as follows:

"Article 70. The following violations shall be sanctioned:

a) Fishing with chemical or explosive elements, with a fine of 1,000.00 to 10,000.00 lempiras;

b) Fishing by persons without a license or with an expired license, with a fine of 50,000.00 to 500,000.00 lempiras;

c) Fishing with banned fishing gear, with a fine of 10,000.00 to 50,000.00 lempiras;

d) For marketing hydrobiological species in a closed season, with a fine of 1,000,000.00 to 2,000,000.00 lempiras;

e) For clearing mangrove swamps or destroying aquatic ecosystems in general, with a fine of 10,000.00 to 50,000.00 lempiras;

f) For polluting with any substance the maritime or continental waters, with a fine of 500.000.00 to 1,000,000.00 lempiras;

g) For capturing, destroying or extracting the protected hydrobiological species, especially the manatee *(Manatus americanus)*, with a fine of 50,000.000 to 100,000.00 lempiras;

h) Owners or captains of vessels who fail to report their catch, with a fine of 50,000.00 to 500,000.00 lempiras;

i) For conducting scientific research without a permit from the National Fishery Authority, with a fine of 50,000.00 to 100,000.00 lempiras;

j) Owners or captains of fishing vessels who fail to comply with the provisions relative to the installation of Marine Turtle Excluder Devices (DETs), according to what is established by the National Fishery Authority, with a fine of 50,000.0 to 100,000.00 lempiras; and

k) For any other activity not expressly mentioned in the preceding items, but which is analogous, with a fine of 1,000,000.00 to 1,500,000.00 lempiras."

Article 2. Added to the aforementioned Fishery Law, the following Article:

"Article 81-A. The fines assessed by reason of the enforcement of this Law and the income received for the taxes, licenses or permits referred to therein must be paid to the General Treasury of the Republic and, through the General Budget of Income and Expenses of the Republic, must be allocated to the expense for the programs and projects carried out by the Secretariat of State in the Offices of Agriculture and Livestock through the General Fishery Directorate (DIGIPESCA)."

Article 3. The Executive Branch, through the Secretariat of State in the Offices of Agriculture and Livestock, shall issue whatever regulations as may be necessary to properly enforce the reforms introduced by this Decree in the Fishery Law.

Article 4. This Decree shall enter into effect at the time of its approval and must be published in the Official Daily *La Gaceta* ["The Gazette"].

Given in the city of Tegucigalpa, Municipality of the Central District in the Hall of Sessions of the National Congress, on the ____ day of the month of _____ of the year two thousand.

RAFAEL PINEDA PONCE
SPEAKER OF THE HOUSE

JOSÉ ALFONSO HERNÁNDEZ CÓRDOVA
SECRETARY

ROLANDO CÁRDENAS PAZ
SECRETARY

Dse/

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by

the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on March 14, 2001, to the best of my ability.

Signed: /s/

Paul R. Sadur, M.A.
ATA Accredited Translator
Federally Certified Interpreter

State of Florida, County of Escambia
The foregoing instrument has been acknowledged before me this 14th day of March, 2001 by
Paul Sadur
who produced Driver's License – FL as identification.

/s/
(Signature of Notary Public)
__ *Personally Known* _X_ *Produced I.D.*

Cortney D. Shaw
Commission # CC 992905
Expires Jan 9, 2005
Bonded Thru
Atlantic Bonding Co., Inc.

APPENDIX DD

CONSTITUTION OF THE REPUBLIC OF HONDURAS

Article 96. The Law has no retroactive effect except in criminal matters, whenever the new law favors the criminal or defendant.

APPENDIX EE

Translation

CONSTITUTION OF THE REPUBLIC OF HONDURAS
DECREE NUMBER 131 OF JANUARY 11TH 1982

TITLE V
ABOUT THE POWERS OF THE STATE
CHAPTER I
ABOUT LEGISLATIVE POWER

Article 205.—Correspond to National Congress the following attributions:

1. To create, to decree, interpretation, reform and to abolish laws,

* * * *

TRANSLATOR'S CERTIFICATION

THE UNDERSIGNED official Translator, hereby certify, that I am a Spanish-English translator accredited as such and duly commissioned and authorized by the Ministry of Foreign Affairs, and that the above translation of Article[] 205 (1) . . . of the Constitution of the Republic of Honduras is accurate.

Signed: /s/
Lisa Carol Madrid Sorto
Official Translator

APPENDIX FF

Translation

CONSTITUTION OF THE REPUBLIC OF HONDURAS
DECREE NUMBER 131 OF JANUARY 11TH 1982

TITLE V
ABOUT THE POWERS OF THE STATE

* * * *

CHAPTER IV
ABOUT THE OFFICE OF THE ATTORNEY GENERAL
OF THE REPUBLIC

Article 228. The Office of the Attorney General of the Republic has the Legal representation of the State, its organization and operations will be determined by the law.

End of Translation

TRANSLATOR'S CERTIFICATION

THE UNDERSIGNED official Translator, hereby certify, that I am a Spanish-English translator accredited as such and duly commissioned and authorized by the Ministry of Foreign Affairs, and that the above translation of Article[] . . . 228 of the Constitution of the Republic of Honduras is accurate.

Signed: /s/
Lisa Carol Madrid Sorto
Official Translator

APPENDIX GG

LAW OF THE JURISDICTION OF ADMINISTRATIVE AFFAIRS

ARTICLE 30. The acts of a general nature or provisions issued by the Public Administration may be challenged directly before the Jurisdiction of Administrative Affairs, once they have gone into effect administratively.

Challenges to the acts of a particular nature occurring in the enforcement of the administrative acts of a general nature, based on their failure to comply with the Law, shall also be permitted.

Nevertheless, in any case, any acts of a general nature that are to be complied with by the parties directly affected may likewise be subject to challenge by a suit brought under administrative law, without the parties first having to be subject to said acts or charged thereunder.

Failure to directly challenge a provision or act of a general nature or the dismissal of the action filed against it shall not prevent acts of individual enforcement from being challenged, based on the assumption contained in the preceding paragraph.

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached documents from Spanish into English on May 16, 2002, to the best of my ability.

Signed: /s/

Paul R. Sadur, M.A.
ATA Accredited Translator
Federally Certified Interpreter

WITNESS my hand and official seal, this 16th day of May A.D. 2002

Frances R. Everidge
Notary Public, State of Florida,
My comm. expires Dec. 26, 2003
Commission # CC 897604

Witness my hand and official seal, this 16th day of May, A.D. 2002

/s/

Notary Public
State of Florida at Large

ARTICLE 31. No action under administrative law shall be admitted with regard to:

a) Binding acts, i.e., those against which an appeal has not been filed by the deadline in the proper form, or that have been expressly accepted, and confirming acts of accepted binding acts, as well as those that are a reproduction of other previous already definitive or binding acts;

b) Resolutions that terminate actions through administrative channels as prior to judicial channels and

c) Acts issued by virtue of a Law that expressly excludes them from administrative channels.

ARTICLE 32. An action under administrative law against binding acts and confirming acts of binding acts referred to in item a) of the preceding Article shall be admitted, when they are null and void as a matter of law and are producing effects, but only for purposes of rendering them null and void and inapplicable in the future.

(6) (4)

Nos. 03-622 and 03-627

FILED
DEC 29 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

DAVID HENSON MCNAB, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT D. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

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(202) 514-2217

WILLIAM H. TAFT, IV
Legal Adviser
Department of State
Washington, D.C. 20520

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the reference in the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*, to "any foreign law" refers only to foreign statutes and not to foreign regulations.

2. Whether the court of appeals erred in disagreeing with the representations provided by the Embassy of the Republic of Honduras, as amicus curiae in that court, respecting the application of Honduran law, which differed from the earlier representations that Honduran officials provided to United States officials and to the district court.

3. Whether the Due Process Clause requires a court of appeals to give retroactive effect to a Honduran court's asserted invalidation of a Honduran law.

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In the Supreme Court of the United States

No. 03-622

DAVID HENSON MCNAB, PETITIONER

v.

UNITED STATES OF AMERICA

No. 03-627

ROBERT D. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 331 F.3d 1228.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2003. A petition for rehearing was granted in part and denied in part on May 29, 2003 (Pet. App. 77a-

[1] Citations to the petition appendix refer to the separately bound appendix that accompanies the petition in No. 03-622.

78a). On August 8, 2003, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 26, 2003. On September 20, 2003, Justice Kennedy further extended the time within which to file a petition for a writ of certiorari to and including October 24, 2003, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371, and other federal offenses arising from violation of the Lacey Act Amendments of 1981 (the Lacey Act), 16 U.S.C. 3371 *et seq.* Petitioners McNab, Blandford, and Schoenwetter were sentenced to 97 months of imprisonment, while petitioner Huang was sentenced to 24 months of imprisonment. Pet. App. 8a-9a. The court of appeals affirmed. *Id.* at 2a-3a.

1. The Lacey Act prohibits persons from importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce any fish or wildlife that was taken, possessed, transported, or sold in violation of any underlying foreign law. 16 U.S.C. 3372(a)(2). The Act imposes criminal penalties on violators of this provision who knew or should have known that the fish or wildlife was unlawfully taken, possessed, transported, or sold. 16 U.S.C. 3373(d)(1) (knowing violation); 16 U.S.C. 3373(d)(2) (negligent violation). In addition, Section 545 of Title 18 of the United States Code provides criminal penalties for knowingly importing or dealing in merchandise brought into the United States contrary to law.

2. Petitioner David Henson McNab owned and operated a fleet of lobster fishing boats that harvested Caribbean spiny lobster in Honduran fishing waters. During the period covered by the indictment, the Republic of Honduras imposed conservation regulations to protect its lobster fishery from over-exploitation and health regulations to ensure safe processing of fishery products. Five sets of requirements respecting the harvesting and handling of spiny lobsters are relevant to this case: (1) Resolution 030-95 prohibited harvesting, processing, or selling any spiny lobster with a tail length shorter than 5½ inches; (2) Article 70(3) of the Fishing Law prohibited harvesting or selling egg-bearing lobsters; (3) Article 30 of the Fishing Law required lobster fishermen to dock their vessels and unload their catch in a Honduran port before exportation; (4) Articles 35 and 37 of the Fishing Law required fishing vessels to report their catch in writing to Honduran authorities; and (5) Agreement 0008-93 required that any lobster be inspected and processed in Honduras before exportation. See Pet. App. 51a, 57a-64a.[2]

In violation of those requirements, McNab's fleet harvested lobsters, including egg-bearing lobsters and lobsters with tails less than 5½ inches in length, packed frozen lobsters in bulk plastic bags, and loaded them directly from the lobster boats onto McNab's cargo transport vessel, the *Caribbean Clipper*. See Pet. App. 4a-5a. Some of the lobster tails were handled in compli-

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[2] Petitioner McNab asserts that only three of those requirements are relevant to petitioners' convictions, because the government did not properly charge a violation of the landing requirements in the indictment and the evidence was insufficient for the jury to have found that the reporting requirements were violated. 03-622 Pet. 4 n.2. The court of appeals summarily rejected those arguments. Pet. App. 34a.

ance with Honduran reporting, inspection, and processing requirements, but others were transported aboard the *Caribbean Clipper* in unprocessed bulk bags to Bayou la Batre, Alabama, for delivery to Seamerica Corporation, petitioner Robert Blandford's company. *Ibid.* Once the lobster tails were in the United States, Blandford and a colleague, Abner Schoenwetter, resold the shipments to the American Export Import Corporation, through petitioner Diane Huang, and to other United States companies. See *id.* at 114a-118a (second superseding indictment). The shipments at issue in this case involved approximately 400,000 pounds of spiny lobsters, with a value of approximately $4.6 million. See *id.* at 137a-144a.

On February 3, 1999, agents of the National Marine Fisheries Service (NMFS) received an anonymous facsimile indicating that McNab's *Caribbean Clipper* would arrive in Bayou la Batre on February 5, 1999, with a shipment of lobsters containing "undersized (3 & 4 oz) lobster tails, [which was] a violation of Honduran law." Pet. App. 4a. The facsimile further stated that Honduras prohibited the bulk exportation of lobsters and required that lobsters be packed in boxes for export. *Ibid.* NMFS agents, with the assistance of the United States Department of State, thereupon consulted with the Republic of Honduras—specifically, the Honduran Direccion General de Pesca y Acuicultura (DIGEPESCA), which is the agency within Honduras's Secretaria de Agricultura y Ganaderia (SAG) that is responsible for the enforcement of Honduras fishing laws—seeking information about the legality of the lobster shipment referenced in the facsimile. *Ibid.*[3]

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[3] Throughout the investigation and resulting prosecution, federal agents and prosecutors received guidance and assistance from

The director general of DIGEPESCA responded to the agent's inquiry in three letters that described some of Honduras's laws regulating the lobster industry and confirmed that McNab's shipment had been illegally transported in violation of those laws. The director general provided authentic copies of the applicable laws and stated that the DIGEPESCA was ready to support all efforts by the government to prosecute persons who violate the Lacey Act. In early March 1999, NMFS agents seized the lobster shipment described in the anonymous facsimile based on the verifications by Honduran officials that the lobster shipment was illegal under Honduran law. Pet. App. 4a-5a.

Over the next few months, NMFS agents continued to communicate with Honduran officials about the Honduran laws and the legality of the seized lobster shipment. In June 1999, NMFS agents and an attorney in the United States National Oceanic and Atmospheric Administration (NOAA) met in Tegucigalpa, Honduras, with various Honduran officials from the SAG, including the minister, vice minister, director of legal services, director of legal affairs, secretary general, the director general of the DIGEPESCA, and the legal advisor for the Servicio Nacional de Sanidad Agropecuaria (SENASA), an agency within the SAG responsible for the enforcement of hygiene laws and regulations. Pet. App. 5a. During those meetings the Honduran officials confirmed that the lobsters had been exported illegally without first being inspected and processed, that there was a 5½ inch size limit for lobster tails, and that all catches had to be reported to

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the State Department and the United States Embassy in Honduras in determining which Honduran officials to contact in order to obtain authoritative advice about the contents of Honduran law.

Honduran authorities. The Honduran officials also provided certified copies of the laws in question. *Ibid.*

In September 1999, NMFS agents inspected the lobster shipment that had been seized earlier in the year from McNab's ship. Pet. App. 5a. The inspection confirmed that the seized lobsters were unprocessed and that a significant number had a tail length that was less than the 5½ inches required by the Honduran size limit restriction. In addition, many of the lobsters were egg-bearing or had their eggs removed. *Ibid.* In March 2000, two Honduran officials, a legal advisor in the Despacho Ministerial and a SAG legal advisor, traveled to Alabama to meet with prosecutors and investigators. Both legal advisors provided written statements reconfirming that Honduran law governing the lobster industry established size limits, prohibitions on taking egg-bearing lobsters, and processing and reporting requirements. *Id.* at 5a-6a.

Based upon NMFS's investigation and the verification of the applicable foreign laws by the Honduran officials charged with regulating the lobster fishing industry, the United States decided to prosecute petitioners for their roles in the illegal importing scheme. Pet. App. 6a. A federal grand jury ultimately returned a 47-count second superseding indictment based on the seized shipment and other shipments between 1996 and 1999. *Ibid.*; see *id.* at 114a-152a.

3. The district court conducted a pretrial hearing, in accordance with Rules 12(b) and 26.1 of the Federal Rules of Criminal Procedure, to assist in its determination of the relevant Honduran laws. Pet. App. 6a-7a; *id.* at 44a-65a. The SAG minister sent his secretary general, the SAG's highest-ranking legal official, to testify

at the hearing.[4] The secretary general testified about the validity of various laws and confirmed that the size limit, the prohibition against harvesting egg-bearing lobsters, and the processing and inspection requirement were in effect and legally binding during the time period covered by the indictment. Following the foreign law hearing, the district court ruled that the government met its burden of proving the Honduran laws that served as the predicates for the charges against petitioners. *Id.* at 6a-8a; see *id.* at 51-64a.

Following a jury trial, all four petitioners were convicted of conspiracy under 18 U.S.C. 371 for their part in the unlawful importation scheme. McNab, Blandford, and Schoenwetter were convicted of knowingly importing merchandise into the United States contrary to law in violation of 18 U.S.C. 545. Blandford was convicted of violating the Lacey Act, 16 U.S.C. 3371 *et seq.*, by: (1) dealing in fish and wildlife that he knew were unlawfully taken, possessed, transported, or sold, 16 U.S.C. 3372(a)(2)(A), 3373(d)(1)(B); and (2) dealing in fish and wildlife that he should have known were unlawfully taken, possessed, transported, or sold, 16

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[4] Petitioners characterize the secretary general as "a lower level functionary who had *no* legal authority to speak * * * on behalf of Honduras." 03-622 Pet. 17. The court of appeals determined, however, that the secretary general was the "highest-ranking legal official" in the Honduran agency responsible for regulation of the lobster fishing industry. Pet. App. 7a. The minister of that agency specifically sent the secretary general to testify at the district court's foreign law hearing on behalf of the Honduran government and later confirmed in an affidavit that she was authorized to "provide the necessary advice about and explanation of the enforcement and validity of Honduran laws." *Id.* at 8a, 22a n.25. See *id.* at 54a-55a (district court decision describing the secretary general—"[i]n contrast" to petitioners' witnesses—as "well-qualified" and "very credible").

U.S.C. 3372(a)(2)(A), 3373(d)(2). Huang was convicted of violating the Lacey Act by: (1) dealing in fish and wildlife that she should have known were unlawfully taken, possessed, transported, or sold, 16 U.S.C. 3372(a)(2)(A), 3373(d)(2); and (2) falsely labeling fish or wildlife, 16 U.S.C. 3372(d), 3373(d)(3)(A)(i). McNab and Blandford also were convicted of engaging in monetary transactions involving criminally derived property, 18 U.S.C. 1957, and of conspiring to engage in monetary transactions involving criminally derived property, 18 U.S.C. 1957, 1956(h). Pet. App. 79a-80a; 03-627 Pet. App. 169a-170a, 172a, 174a-175a. In total, McNab was found guilty on 28 counts, Blandford on 37 counts, Schoenwetter on 7 counts, and Huang on 17 counts. Pet. App. 8a.

4. After the verdicts, petitioners filed numerous motions to overturn their convictions. Among other things, the motions attacked, based on recent developments in Honduran law, the validity of the foreign laws underlying petitioners' convictions. In particular, the motions cited a May 2001 decision of a Honduran administrative law court, acting on a petition filed by McNab and opposed by the Honduran government. The administrative law court found that Resolution 030-95—which contained the 5½ inch size limit for spiny lobsters—had been promulgated through an incorrect procedure. Pet. App. 290a-301a. The Honduran judge ordered that the resolution was "entirely voided, but this is only for purposes of annulment and future inapplicability." *Id.* at 298a. The Honduran Appeals Court for Administrative Law later affirmed, through a summary order, the lower court judge's decision. *Id.* at 302a-305a.

To prepare for a hearing on petitioners' post-trial motions, an attorney from the Department of Justice and agents from NMFS and the FBI traveled to Hon-

duras in early August 2001 to discuss petitioners' challenges to the validity of the Honduran laws. See Pet. App. 8a. Three Honduran government officials, including the SAG secretary general, provided the United States with affidavits confirming the validity of the laws petitioners were challenging. *Ibid.* They also received an affidavit from the SAG minister stating that those Honduran government officials were authorized to provide advice on the enforcement and validity of the laws. *Ibid.* Following a hearing, the district court dismissed each of petitioners' post-trial motions. *Ibid.* The court sentenced McNab, Blandford, and Schoenwetter to 97 months of imprisonment and Huang to 24 months of imprisonment. *Id.* at 8a-9a.

Shortly thereafter, the Fiscal General Adjunto of Honduras, who directs the office that oversees criminal enforcement of Honduran laws, sent a letter to the United States Embassy in Honduras advising the embassy about various matters of Honduran law related to the decision of the Honduran Court of Administrative Law that Resolution 030-95 was promulgated through a technically improper procedure. See U.S. Add. to C.A. Br. (No. 01-15148-JJ) Tab 1. Among other things, the Fiscal General Adjunto stated that the Honduran court's decision on its face applied only prospectively, and that this was consistent both with Article 32 of the Law of Administrative Jurisdiction and with Article 96 of the Honduran Constitution. *Ibid.* He concluded that the court's decision "does not free [McNab] from the sanctions that would have resulted from a failure to observe the contested resolutions." *Ibid.*

5. After sentencing, petitioners appealed their convictions based, in part, on their contention that the Honduran laws used as the predicates for the Lacey Act convictions were invalid or void during the time

period covered by the indictment. With their appellate briefs, petitioners submitted several new documents, including the appellate court decision affirming the prospective invalidation of Resolution 030-95 (Pet. App. 302a-305a), an advisory report from the Honduran Human Rights Commissioner adopting certain allegations by McNab (*id.* at 306a-314a), and a statement from the minister of SAG concurring with McNab's allegations (*id.* at 315a-320a). At the same time, petitioners each filed a motion for new trial in the district court attaching the same documents. When the district court denied those motions, petitioners each filed an additional appeal. *Id.* at 9a n.12.

To assist in preparing the government's appellate brief in the first set of appeals, a Department of Justice attorney and NMFS agents again traveled to Honduras to discuss petitioners' new documents with Honduran officials. Pet. App. 9a. Once again, the Honduran officials confirmed their prior statements regarding the validity of the Honduran laws. *Ibid.* After briefing on petitioners' first set of appeals was complete and during briefing on petitioners' second set of appeals, the Embassy of Honduras and the Asociacion de Pescadores del Caribe, a Honduran trade association, filed a joint amicus curiae brief in support of McNab. *Id.* at 20a n.23 Although Honduran officials had assisted and supported the prosecution throughout the investigation and trial of this case, the Embassy and trade association's brief maintained that certain of the Honduran laws underlying petitioners' convictions were invalid at the time of the lobster shipments or had been repealed and that the United States had failed to consult with the proper Honduran officials and, instead, had intentionally sought out "midlevel employees who were not

authorized to render opinions on behalf of the Honduran government" (*id.* at 22a n.25).[5]

6. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-34a. Although petitioners raised and the court ruled on numerous issues, only two are relevant here. First, the court held that the Lacey Act's prohibition against importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce fish or wildlife taken, possessed, transported, or sold "in violation of any foreign law" includes foreign regulations and other legally binding requirements that have the force of law, and not just foreign statutes. *Id.* at 10a-18a. Second, the

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[5] Notwithstanding the Embassy's representations, the Honduran government apparently does not act in accordance with the Honduran administrative court's conclusion that Resolution 030-95 was issued through an incorrect procedure. The Honduran court cited two reasons for its conclusion: (1) that Resolution 030-95 was issued as a "Resolucion" rather than an "Acuerdo," the former being a form of law that is to be used only for resolving individual disputes and not to set forth general rules of conduct such as the size limit; and (2) Resolution 030-95 was not signed by the President. Pet. App. 290a-292a. But Honduras apparently continues to make widespread use of resolutions not signed by the President "to set requirements of general applicability" in regulating industry, and Honduras takes enforcement actions for violations of those requirements. U.S. Add. to C.A. Br. (No. 01-15148-JJ) Tab 2 (statement of Fiscal General Adjunto). For example, the Honduran Embassy recently submitted, as recently as August 2003, various resolutions, none of which were signed by the President, to the United States Department of State as evidence supporting its contention that Honduras should be certified pursuant to United States law as adequately regulating its shrimp fishery to prevent incidental taking of sea turtles. See Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609(b), 103 Stat. 1038.

court rejected petitioners' contentions that three of the five Honduran laws underlying their convictions were invalid during the period covered by the indictment. *Id.* at 18a-34a.

The court of appeals devoted the majority of its discussion to the validity of the Honduran laws. The court specifically examined the views expressed by the Honduran Embassy and a Honduran trade association, on the one hand, and the positions taken by Honduran officials throughout the investigation and prosecution of petitioners, on the other. The court of appeals stated that the unusual circumstances of the case required it to determine "whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to follow the Honduran government's original position." Pet. App. 20a.

The court stated that, in determining questions of foreign law, "[a]mong the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country." Pet. App. 21a. Under normal circumstances, "[t]he court reasonably may assume that statements from foreign officials are a reliable and accurate source and may use such statements as a basis for its determination of the validity of foreign laws." *Id.* at 21a-22a. The court of appeals observed, however, that the circumstances of this case presented an unusual situation because Honduran officials had supported the validity of its laws and assisted the United States government throughout the investigation and prosecution, but then, after petitioners had been sentenced and the case was on appeal, Honduran officials had attempted to refute the original position of their country's representatives. *Id.* at 3a, 22a-23a. Accordingly, the court found, it was required to decide "a matter of first

impression": "whether our courts are bound by a foreign government's new representations regarding the validity of its laws when its new representations are issued only postconviction and directly contravene its original position upon which the government and our courts relied and the jury acted." *Id.* at 3a.

The court of appeals concluded that, where "a foreign government changes its original position regarding the validity of its laws after a defendant has been convicted, our courts are not required to revise their prior determinations of foreign law solely upon the basis of the foreign government's new position." Pet. App. 22a-23a. The court conducted its own analysis of the three Honduran laws that petitioners challenged, and it determined that those laws were valid during the period covered by the indictment. *Id.* at 24a-33a. The court also rejected the Honduran Embassy's and trade association's assertion in their amicus brief that the United States had not followed the proper channels in contacting Honduran officials about the validity of the Honduran laws at issue in the case. *Id.* at 22a n.25. The court found that "the record indicates quite the contrary" and that "it is clear that the government conducted its investigation properly through the Honduran officials who were responsible for interpreting, enforcing, and applying the fishing laws of Honduras." *Ibid.*[6]

ARGUMENT

Petitioners contend that the Lacey Act applies only to foreign laws, not foreign regulations, that the court of appeals failed to accord deference to a foreign sover-

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[6] Expressing "some hesitation," Judge Fay dissented "from that portion of the majority opinion upholding the validity of Honduran Resolution 030-95," which was one of the three Honduran laws at issue. Pet. App. 35a.

eign's interpretation of its own laws, and that the enforcement of Honduran law through the Lacey Act in this case violates due process. 03-622 Pet. 14-30; 03-627 Pet. 10-30. Those contentions lack merit. The court of appeals correctly concluded that the Lacey Act's reference to "any foreign law" includes both a foreign nation's statutes and its regulations. In evaluating the Honduran laws at issue here, the court gave due consideration to the Government of Honduras's position, as expressed by the Honduran Embassy, but the court ultimately and appropriately determined the substance of foreign law based on all the information before it. And there is no merit to petitioners' argument, which they raised for the first time on petition for rehearing, that the court's application of Honduran law would violate the Due Process Clause. Contrary to petitioners' contentions, the court of appeals' resolution of those issues does not conflict with any decision of this Court or another court of appeals, nor do those issues present any question otherwise warranting this Court's review.

1. Petitioners Blandford, Schoenwetter, and Huang argue (03-627 Pet. 28-30) that the Lacey Act's reference to "any foreign law" refers only to foreign statutes and does not include a foreign nation's administrative regulations and other legally binding provisions. The court of appeals, like every other court that has encountered the issue, correctly rejected that argument. See Pet. App. 10a-18a.

As this Court has recognized, the term "law" is commonly understood to include administrative regulations. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979) (holding that "authorized by law" in 18 U.S.C. 1905 includes administrative regulations); see also *United States* v. *Mitchell*, 39 F.3d 465, 468 (4th Cir.

1994) (holding that "contrary to law" in 18 U.S.C. 545 includes administrative regulations), cert. denied, 515 U.S. 1142 (1995). Consistent with that understanding, the lower courts have consistently interpreted the term "any foreign law" in the Lacey Act to include all forms of foreign law and not simply statutes. The Ninth Circuit has twice so held, rejecting precisely the arguments advanced here by petitioners. See *United States* v. *Lee*, 937 F.2d 1388, 1392 (1991) (holding that a violation of a foreign regulation constitutes a violation of "any foreign law" within meaning of the Lacey Act), cert. denied, 502 U.S. 1076 (1992); *United States* v. *594,464 Pounds of Salmon*, 871 F.2d 824, 830 (1989) (same). Other courts, without explicitly discussing the issue, routinely have applied the Lacey Act to violations of foreign laws that were not statutes.[7]

Petitioners suggest that the lower courts' uniform interpretation of the Lacey Act conflicts with this Court's decision in *United States* v. *Eaton*, 144 U.S. 677 (1892). *Eaton* involved a statute regulating manufacturers and dealers in oleomargarine that provided criminal penalties for knowing or willful failures "to do, or cause to be done, any of the things required by law." *Id.* at 684-685. The Court held that violation of an Internal Revenue Service regulation imposing record-

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[7] See, *e.g.*, *United States* v. *One Afghan Urial Ovis Orientalis Blandfordi Fully Mounted Sheep*, 964 F.2d 474, 477 (5th Cir. 1992) (importation into the United States of sheep exported from Pakistan in violation of Pakistani Export Trade Order); *United States* v. *Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 388-389 & n.6 (S.D. Fla. 1993) (lobsters taken in violation of Turks and Caicos Fisheries Protection Regulations); *United States* v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1113 (S.D. Fla. 1988) (birds exported from Peru in violation of Peruvian Supreme Decree).

keeping requirements on margarine wholesalers did not trigger criminal penalties under that statutory provision. *Id.* at 687-688. This Court has repeatedly cautioned, however, that *Eaton* "turned on its special facts" and "has not been construed to state a fixed principle that a regulation can never be a 'law.'" *United States* v. *Howard*, 352 U.S. 212, 216 (1957); *Singer* v. *United States*, 323 U.S. 338, 345 (1945). Hence, there is no conflict between *Eaton* and the court of appeals' decision in this case.[8]

2. Petitioners argue (03-622 Pet. 15-28; 03-627 Pet. 10-20) that the court of appeals failed to give appropriate deference to the Honduran Embassy's representations respecting the application of Honduran law. Petitioners mischaracterize the court of appeals' decision, which accorded due consideration to the position expressed by the Honduran Embassy, but, on examination of the totality of circumstances, concluded that the embassy's position was not persuasive.

a. Rule 26.1 of the Federal Rules of Criminal Procedure provides that a federal court shall determine issues of foreign law as "questions of law" and authorizes the court to "consider any relevant material or source." Accord Fed. R. Civ. P. 44.1. Rules 26.1 and 44.1 make clear that the court has ultimate authority for resolving issues of foreign law, but it may consider the representations of foreign nations respecting application of their laws. The federal courts have developed the practice of granting substantial—but measured—

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[8] Indeed, *Howard* involved the Federal Black Bass Act, a predecessor of the Lacey Act that in relevant part prohibited transportation of fish across state lines contrary to "the law of the State" from which the fish was transported. 352 U.S. at 215-219. The Court held that "law of the State" included administrative rules and regulations. *Ibid.*

deference to a foreign nation's representations respecting its own laws. As the Second Circuit recently stated, "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2002), cert. denied, 123 S. Ct. 2256 (2003).[9]

The court of appeals followed that approach in this case. It noted that statements from foreign officials are "logical sources for the court to look at in its determination of foreign law" and that courts "reasonably may assume that statements from foreign officials are a reliable and accurate source" in determining issues of foreign law. Pet. App. 21a-22a. But consistent with *Karaha Bodas*, the court refused to accept uncritically the Honduran Embassy's new representations, which differed dramatically from past Honduran representations. See *id.* at 22a-24a.

The court's decision is not only consistent with the approach articulated in *Karaha Bodas* and other cases, but it is also consistent with deference principles generally. As this Court has explained in the context of federal administrative law, "[t]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998)

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[9] Accord *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (stating that "courts may defer to foreign government interpretations," but declining to do so under the circumstances of that case), cert. denied, 531 U.S. 917 (2000); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law.").

and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). But that deference is not unbounded:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all the factors which give it power to persuade, if lacking power to control.

Id. at 228 (quoting *Skidmore*, 323 U.S. at 140). As petitioners concede, analogous principles apply here. 03-622 Pet. 23.[10]

Under those traditional deference principles, the court of appeals' refusal to accept uncritically the Honduran Embassy's new representations respecting Honduran law was appropriate. Those representations —which departed from past Honduran representations made directly both to United States officials through

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[10] Petitioners mistakenly cite *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as an example of deference principles. *Chevron* deals with the specific situation in which deference is appropriate because Congress has explicitly or implicitly delegated responsibility to a federal agency to make rules carrying the force of law. See *Mead*, 533 U.S. at 226-227. That case does not provide the appropriate analogy here because the Federal Rules of Criminal Procedure charge the federal courts with the responsibility to determine, de novo, the content of foreign law. See *Riggs Nat'l Corp.* v. *Commissioner*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) (federal rules of procedure "direct[] U.S. courts to conduct a *de novo* review of foreign law"). *Skidmore* instead provides the appropriate analogy. Compare *Skidmore*, 323 U.S. at 140 (an agency's explanation has "power to persuade, if lacking power to control"), with *Karaha Bodas*, 313 F.3d at 92 ("a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference"); see also *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (interpretations in agency opinion letters receive *Skidmore* deference).

inter-governmental consultations concerning this specific prosecution and to a federal district court—did not reflect a consistently held view of Honduran law. See Pet. App. 5a-9a, 24a-33a; pp. 4-7, 8-10, *supra*. The court of appeals specifically determined that the Honduran Embassy's primary explanation for the change in position—that the previous position merely reflected the opinions of unauthorized low-level functionaries that had been solicited in a deliberate attempt to bypass official channels—was untrue. Pet. App. 22a n.25. Furthermore, the new representations lacked the "power to persuade" because they conflicted with the text of the laws, other pertinent Honduran legal authority, and the evidence of petitioner McNab's own expressed understanding of those laws. See *id.* at 24a-28a (Resolution 030-95), 29a-31a (Regulation 0008-93), 32a-33a (Article 70(3)).[11]

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[11] Judge Fay dissented only from the majority's analysis of Resolution 030-95, which imposed the size limit on lobsters. Pet. App. 35a. In his view, the Honduran government had not "changed its position" on the validity of that resolution and the Honduran court's asserted invalidation was controlling. See *ibid.* Judge Fay, however, was mistaken in his understanding of the record. During the district court's pretrial proceedings to determine foreign law, Honduran officials testified that the resolution was valid at the time of the offense. See *id.* at 24a n.26. McNab (who had recognized the validity of the resolution at the time of his unlawful takings, *ibid.*) later successfully sought to invalidate the resolution on procedural grounds. The Honduran court, however, invalidated the regulation "*only for purposes of [its] annulment and future inapplicability.*" *Id.* at 25a. Following that action, Honduran officials repeatedly confirmed that the invalidation, by its terms, would not have retroactive effect. See *id.* at 26a n.28, 27a n.29. That conclusion is consistent with other provisions of Honduran law. *Id.* at 27a n.30.

The court of appeals' decision rests on a proper understanding and articulation of deference principles. At bottom, petitioners simply challenge the court's application of those correctly stated principles to a situation —the determination of the scope of three particular Honduran fishing regulations—that is unlikely ever to recur. That issue does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

b. There is no merit to petitioners' claim that the court of appeals' decision conflicts with decisions of other courts of appeals. Petitioners rely on cases involving markedly different factual situations, and the differences in outcome are correspondingly unremarkable. As this Court has explained in the domestic law context, and the lower courts have consistently recognized in the foreign law context, the application of deference principles depends on a variety of factors and therefore inevitably leads to results that vary with the circumstances. See, *e.g.*, *Mead*, 533 U.S. at 228; *Karaha Bodas*, 313 F.3d at 92.[12]

Petitioners cite, for example, *Riggs National Corp.* v. *Commissioner*, 163 F.3d 1363 (D.C. Cir. 1999), as an example of a court's deference to a foreign govern-

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[12] Petitioners also argue (03-622 Pet. 15) that the court of appeals' decision is inconsistent with dicta from this Court's 1825 decision in *Emmendorf* v. *Talyor*, 23 U.S. (10 Wheat.) 152, 159-160 (1825), suggesting deference to the decisions of foreign courts respecting foreign law. This case, however, involves the question of deference to the views expressed below by the Honduran Embassy on behalf of the Republic of Honduras interpreting its laws and judicial decisions, and the *Emmendorf* dicta accordingly does not address the issue presented here.

ment's interpretation of foreign law. See 03-622 Pet. 15-17. That decision, however, which involved the act of state doctrine, is clearly distinguishable The issue before the court was whether Brazil had properly applied its tax laws to the Central Bank of Brazil. The court was "hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised." *Riggs Nat'l Corp.*, 163 F.3d at 1368. The court concluded, however, that Brazil's "order to the Central Bank to pay the taxes," which required the Central Bank to undertake government-compelled action in Brazil, "goes beyond a mere interpretation of law" and is therefore subject to the act of state doctrine. *Ibid.* In this instance, the court of appeals has no occasion to call into question any "act of state." See Pet. App. 23a ("Honduras has every right to invalidate and repeal the laws at issue in this case."). Rather, the court examined solely the Honduran government's inconsistent characterizations of its laws and judicial decisions. *Id.* at 24a-33a.

Petitioners also rely (03-622 Pet. 17-18) on *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir.), cert. dismissed, 506 U.S. 948 (1992), which held that a Chinese corporation was required to comply with the district court's discovery orders, even if doing so would violate Chinese secrecy laws. *Id.* at 1474-1479. In so holding, the court "accepted" the Chinese Government's position that the discovery orders would require the Chinese corporation to violate Chinese law. *Id.* at 1474. The court stated that such acceptance was required because it had "neither the power nor the expertise to determine for ourselves what [Chinese] law is." *Id.* at 1474 n.7. The court was plainly mistaken in

suggesting that federal courts lacked the "power" to determine the content of Chinese law. See Fed. R. Crim. P. 26.1; Fed. R. Civ. P. 44.1. Nevertheless, as the court of appeals in this case expressly recognized (Pet. App. 21a), the court was entitled to rely on the foreign government's representations in the absence of countervailing considerations. In any event, the court's discussion of the issue of Chinese law also was dicta. The resolution of that issue was unnecessary to its decision because the court found that the Chinese company had to comply with the district court's discovery order regardless of whether Chinese law prohibited such compliance. 959 F.2d at 1474-1479.

Petitioners next rely (03-622 Pet. 19-22) on *Karaha Bodas, Access Telecom, Inc.* v. *MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), cert. denied, 531 U.S. 917 (2000); and *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992), which all simply stand for the proposition that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas*, 313 F.3d at 92 (citing *Amoco Cadiz*, 954 F.2d at 1312, and *Access Telecom*, 197 F.3d at 714). Each of those cases involves the application of the same deference principles that the court of appeals applied here to different factual situations.

In *Karaha Bodas*, the Second Circuit concluded, after conducting its own analysis of an issue of Indonesian law, that the Indonesian government's representations provided additional support for the court's conclusion. 313 F.3d at 90-92. In *Access Telecom*, the Fifth Circuit noted that "courts may defer to foreign government interpretations [of their laws]," but did not follow an interpretation of Mexican law stated in an Official Circular of the Mexican Secretary of Communications

and Transportation because, among other reasons, it was not clear that the Secretary was authorized to interpret Mexican law and the most relevant Official Circular addressed a more recent enactment than the one at issue in that case. 197 F.3d at 714. In *Amoco Cadiz*, the Seventh Circuit gave "substantial deference" to the French Government's interpretation of its laws, where France's interpretation reflected its long-standing consistent position on the issue presented. 954 F.3d at 1312. In none of those cases did the court of appeals encounter the specific situation present here, where the foreign representatives' statements were inconsistent with the text of the relevant legal authorities and other official representations made to United States officials and a lower court. See Pet. App. 24a-33a.[13]

Indeed, petitioners cite (03-627 Pet. 14) only one decision that remotely resembles the situation presented in this case, *Jota* v. *Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998), and that decision supports the outcome here. In

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[13] The other decisions that petitioners cite are likewise distinguishable. In *Kaho* v. *Ilchert*, 765 F.2d 877 (9th Cir. 1985), the Crown Solicitor of Tongo initially wrote a letter to the U.S. Library of Congress expressing his view on an issue of Tongan law, and then six months later sent a letter clarifying his view. *Id.* at 883. Both letters predated not only the case, but also the filing of the immigration petition that gave rise to the litigation. The court of appeals did not simply defer to the Tongan Government's position but instead resolved the issue of Tongan law based on its own detailed analysis of the materials in the record. *Id.* at 884-885. In *United States* v. *Pillsbury Flour Mills Co.*, 96 F.2d 854 (C.C.P.A. 1938), the Court of Customs and Patent Appeals held that it should defer to the Cuban Government's interpretation of a Cuban tax law, where it was uncontested that the interpretation had consistently been followed in Cuba and never challenged in Cuban courts. *Id.* at 858-859.

that instance, the Second Circuit declined to defer to the Republic of Ecuador's changed view of its own law while a matter was on appeal. The court of appeals stated that it was permissible to "hold[] a nation to the litigating position it asserted prior to the entry of judgment." *Id.* at 160. Although the court also noted the countervailing "desirability of having the courts of one nation accord deference to the official position of a foreign state," it recognized that "consideration of a nation's altered litigating stance cannot justify an altered outcome that would unduly prejudice a party that had acted in reliance on a judgment entered in light of the nation's original position or would result in a significant waste of judicial resources by renewing litigation fully tried." *Ibid.*[14]

Petitioners are also mistaken in contending (03-622 Pet. 27-28) that the issue presented here—whether a federal court may disagree with a foreign embassy's representations respecting foreign laws, when those representations differ from the text of the relevant legal authorities and from authoritative representations provided earlier by foreign officials to the United States and to a lower court—will occur with any frequency. The court of appeals in this case described the matter as one of "first impression in this Circuit and apparently the other circuits as well," Pet. App. 3a, while the court of appeals in *Jota* described the situation as one that is "rarely encountered," 157 F.3d at 160. While foreign law may regularly be implicated in

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[14] The court ultimately determined that, because the district court had erred in its rulings, "[t]his case does not require us to determine whether, or in what circumstances, we might remand a case, pending on direct review, solely because of a sovereign nation's altered litigating position." 157 F.3d at 161.

domestic litigation, the degree of deference will inevitably vary with the circumstances. This Court's review is unlikely to provide significant guidance beyond the Court's prior observation in the domestic law context that courts must "tailor deference to variety." *Mead*, 533 U.S. at 236.

3. Petitioners mistakenly contend (03-622 Pet. 28-30; 03-627 Pet. 20-21)) that their convictions are invalid because they are entitled to the benefit of any favorable changes in Honduran law. To the extent that petitioners rely on the Honduran Embassy's new representations concerning Honduran law, however, those materials constitute interpretations of Honduran law. They do not constitute a change in the laws themselves.[15]

Some actual changes in Honduran law—as opposed to mere changes in opinion about Honduran law—did occur during the course of the proceedings below. In December 1999, Honduras repealed Regulation 0008-93, which contained the inspection and processing requirements, and replaced it with updated but substantially similar inspection and processing requirements. Pet. App. 29a. In 2001, a Honduran court declared Resolu-

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[15] The question whether petitioners could have been convicted of a criminal offense in Honduras is, of course, irrelevant to the validity of their convictions in the United States, because the Lacey Act's criminal enforcement provisions apply regardless of whether a defendant could face criminal enforcement action for the underlying violation of a law regarding fish or wildlife. See *United States* v. *Lee*, 937 F.2d 1388 (9th Cir. 1991) (affirming Lacey Act conviction for violations of Taiwanese administrative regulation that carry no criminal sanction in Taiwan); *United States* v. *Cameron*, 888 F.2d 1279, 1282 (9th Cir. 1989) (affirming Lacey Act conviction for violations of federal Halibut Act that would not be a criminal violation under the Halibut Act).

tion 030-95, the size limit regulation, prospectively invalid. *Id.* at 25a. Also in 2001, the Honduran Congress amended Article 70(3) of the Fishing Law, which contains the prohibition against harvesting or destroying lobster eggs. *Id.* at 33a. As the court of appeals explained, however, the inquiry mandated by the Lacey Act is the legality of the conduct under Honduran law at the time it occurred, rather than whether such conduct is now legal:

> If the laws were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act by importing the lobsters in violation of those laws. Whatever changes in the laws occurred after the lobsters were imported into the United States illegally have no effect on the defendants' convictions.

Id. at 19a-20a; see *id.* at 27a-28a ("The fact that Honduras now may not hold the defendants liable for past shipments that contained undersized lobsters does not change the fact that those shipments violated then-valid Honduran laws and the Lacey Act."). Because, as the court of appeals found, none of these changes in Honduran law had retroactive effect under Honduran law, they did not retroactively legalize petitioners' lobster shipments.[16]

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[16] The court of appeals specifically examined Article 96 of the Honduran Constitution, which provides that changes in the law do not have a retroactive effect, the only exception being that a "new law" applies retroactively in penal matters. Pet. App. 28a n.30, 415a. The court of appeals reasoned that the Honduran court's declaration of the prospective invalidity of Resolution 030-95 was not a "new law" and that the exception for penal matters therefore did not apply. *Id.* at 27a n.30. The exception for "new law" in penal matters also would not apply because no Honduran "penal

Petitioners mistakenly suggest (03-622 Pet. 29; 03-627 Pet. 21) that United States law mandates that changes in Honduran law must operate retroactively to petitioners' benefit. The questions whether the lobster shipments violated Honduran law and whether subsequent developments in Honduran law retroactively legalized the shipments are questions of Honduran law. The Due Process Clause of the Fifth Amendment to the United States Constitution does not require that Honduras apply its invalidation of Honduran law retroactively. Cf. *Bunkley* v. *Florida*, 123 S. Ct. 2020 (2003) (per curiam) (accepting the Florida Supreme Court's characterization of its state law determination for purposes of due process analysis); *Fiore* v. *White*, 531 U.S. 225, 228-229 (2001) (per curiam) (accepting Pennsylvania's characterization of its state law determinations for purposes of due process analysis).

The court of appeals correctly focused, therefore, on whether, under Honduran law, the relevant requirements were in effect during the period covered by the indictment. The court of appeals' determination that Honduras did not retroactively invalidate the regulations at issue presents a case-specific, non-recurring question that does not merit this Court's review.

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matters" or criminal proceedings were involved in this case, which was a prosecution in a United States court for federal criminal offenses. See *ibid.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 03-622

IN THE

Supreme Court of the United States

DAVID HENSON MCNAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Acting Solicitor General now *concedes* that federal courts generally should defer to foreign governments on the meaning of their own laws, but he proffers the weakest rule he can muster ("*Skidmore*" deference) as the appropriate standard, and he implausibly avers that the Eleventh Circuit (which never adverted to *any* deference rule) somehow correctly applied it. The Acting SG's late-blooming concession that some kind of deference is required cannot avoid plenary review, because other circuits follow far more robust deference rules than what he now proposes: the D.C. and Ninth Circuits would hold that the act-of-state doctrine *requires* acceptance of the Republic of Honduras's views in this case, and the Seventh Circuit would hold that it is "unacceptable" to grant the Republic less deference than administrative agencies receive under *Chevron*, a proposition that the Acting SG expressly disputes. The Acting SG's eleventh-hour embrace of a deference rule, however, does make clear that this case should be remanded even if the Court is not persuaded that it is suitable for plenary review (whether on the foreign-law or due process questions), because the opinion below clearly flunks even the Acting SG's own standard.

I. The Acting Solicitor General's Own "*Skidmore* Deference" Standard Requires Reversal In This Case

1. The court of appeals filed two opinions in this case. The first opinion rejected every representation about Honduran law that the Republic, through its embassy, presented to the court; the opinion capped its analysis with the proposition that it was up to the U.S. prosecutors to decide who speaks for Honduras, since the "political question" doctrine forbade second-guessing the "Executive Branch's" decision to reject Honduras's official position. Pet. App. 90a-91a. The second opinion, issued after a rehearing petition pointed out that courts may not constitutionally "defer" to the prosecution on an element of a criminal offense, was in all respects *identical*

to the first, except that the court deleted the two capstone paragraphs that expressly deferred to the prosecutors. That deletion leaves, as the sole reason for the court's high-handed treatment of the Republic, the proposition that district courts' conclusions on foreign law should be viewed as "final"—lest individuals with "means and connections" (*id.* at 23a-24a) persuade presumptively venal foreign governments to shade the law in their favor.

The Acting SG has now imagined yet a third Eleventh Circuit opinion. In the Acting SG's fictional version, the Eleventh Circuit never embraced a rule of "finality" that freezes foreign law at the trial level in order to guard against the presumed corruption of foreign governments; that aspect of the court's opinion (or the separate circuit conflict it creates) is never even *mentioned* in the brief in opposition. According to the Acting SG (Opp. 16-18), the Eleventh Circuit actually recognized its legal duty to "defer" to Honduras's official views, and in fact applied a form of "*Skidmore*" deference (*see Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)) that he says is in line with the Second Circuit's rule that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003). The Acting SG asserts that the Eleventh Circuit merely declined to credit the Republic's views under that "measured deference" standard (Opp. 16-17) based on "determinations" purportedly unique to this case.[1]

Those contentions are, if nothing else, audacious. The Eleventh Circuit *nowhere* mentioned the rule that courts generally must defer to foreign governments on questions of foreign law, much less did it cite *Skidmore*, *Karaha Bodas*, or

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[1] *E.g.*, Opp. 7 n.4 (court "determined" that the prosecution's witness was "the 'highest-ranking legal official'" in a relevant Honduran agency); *see also, e.g.*, *id.* at 19 (Republic's statements "untrue").

any other decision from *any* court addressing *any* deference rule, foreign or domestic. Moreover, every "determination" on which the government now relies was part of the court's original opinion and thus necessarily was made in aid of the court's (now abandoned) notion that it was bound by the "Executive Branch's decision not to accept" the views of the Republic. To do otherwise, the court had reasoned, would violate the political-question doctrine by "plac[ing] this Court in conflict with the Executive Branch with respect to the amount of deference due a foreign government official's position." Pet. App. 91a. For the Acting SG now to say that the same "determinations" somehow demonstrate that the Eleventh Circuit *did* defer to the Republic's views is astounding.[2]

2. The Acting SG's "*Skidmore* deference" standard is not only a recent tactical invention, but also a fruitless one, because the Eleventh Circuit's decision plainly flunks even that standard. Not only is the opinion bereft of any evidence that the court believed it was applying any *Skidmore* test (or giving "deference" to anyone but the prosecutors), its analysis in fact includes *a rule of law* (or "finality" principle) that seeks to guard against corruption by *rejecting* deference and holding that foreign governments can never change their initial views after those views are presented to a federal trial court. The Acting SG omits from his contrived *Skidmore* analysis any

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[2] Not surprisingly, key "determinations" on which the government now relies to assert that the Eleventh Circuit properly deferred to the Embassy's views turn out, upon inspection, to demonstrate the precise opposite: that court's uncritical acceptance of the prosecutors' claims. As the Republic has pointed out, the Eleventh Circuit's purported "determination" that the prosecution's star witness was the "highest ranking legal official" in the Ministry of Agriculture—which the Acting SG trumpets before this Court—was based solely on a federal prosecutor's naked *assertion* of that purported fact. *See* Br. for Honduras 16 n.17. The Republic's brief also explains (*id.* at 6 n.4) why the government is wrong to assert that extra-record materials further demonstrate that the Republic treats as valid resolutions not signed by the President. Opp. 11 n.5.

mention of that part of the court's holding, which cannot conceivably be supported under any proper *Skidmore* analysis, since this Court has long insisted that foreign governments, like domestic administrative agencies, are entitled to a presumption of regularity. *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) (public officers); *United States v. King*, 44 U.S. (3 How.) 773, 785-86 (1845) (foreign governments). Indeed, as the petition pointed out (Pet. 25-27), that aspect of the Eleventh Circuit's analysis gives rise to its own circuit conflict—one that the Acting SG, tellingly, does not even bother to address.

3. More fundamentally, the Acting SG's *Skidmore* analysis proceeds from the unarticulated premise that the Executive Branch can unilaterally decide who has legal authority to speak on behalf of foreign governments on questions of foreign law—a premise that even the Eleventh Circuit abandoned on rehearing. Thus, the Acting SG asserts that the prosecutors relied on the U.S. State Department and the U.S. Embassy in Honduras "in determining which Honduran officials to contact in order to obtain authoritative advice" (Opp. 4-5 n.3), though both foreign-policy organs somehow managed to miss that Honduras is a civil-law country whose Constitution names the Congress as the highest interpretive authority and expressly names the attorney general as the sole "legal representative" of the Nation. The Acting SG then devotes the great bulk of his brief to chronicling and defending the contacts, during the investigation, with the mid-level Honduran officials identified by the U.S. Embassy. *Id.* at 4-10, 18-19.[3] He goes so far as to refer to the views of those

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[3] That emphasis, which overwhelms by far any discussion of certiorari criteria in opposition, is misplaced. The issue is not whether these officials were appropriate initial points of contact for American agents investigating foreign law, nor is it even whether some such officials could properly be qualified as run-of-the-mine expert witnesses on Honduran law. Rather, the issues are whether those officials spoke on behalf of Honduras and whether the court of appeals was "free to follow" the inter-

lower-level officials—including views informally communicated *out of court* to prosecution agents—as "official representations" and "authoritative representations." *Id.* at 23, 24.

As other circuits have recognized, however, the question of who speaks authoritatively for a foreign country on the meaning and scope of that country's law is *itself* a question of *foreign* law governed by foreign-law deference principles. *See Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (examining whether Mexican agency was empowered to interpret, not just enforce, certain laws, and denying deference because the Republic of Mexico did not endorse the proffered interpretation of a mere "enforcement" agency). Because of its initial assumption that our Executive's views are controlling, the Eleventh Circuit never actually examined that threshold question on its merits.

While the Acting SG repeatedly attempts to elide that fundamental problem, those attempts are transparently fallacious: The essence of the government's position is that the Republic's official views are not entitled to deference because they "differ[] dramatically from *past Honduran representations*." Opp. 17 (emphasis added). The word choice reveals the elision: To be sure, the prosecution presented the views of selected *Hondurans* who were mid-level government "officials." But as a matter of Honduran law (as that country's attorney general has explained, without contradiction, time and again), none of those assertions can purport to be the official views *of Honduras*. Even in this Court, the Acting SG offers no basis for concluding that the views of the prosecution's witnesses

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pretations of a subordinate official once her superior had rejected those views and issued a contrary interpretation that, *under Honduran law*, is indisputably binding. Remarkably, the Acting SG never so much as discusses petitioner's *successful* civil rights complaint, which resulted in the Minister of Agriculture's official repudiation of the views expressed by the prosecution's witness, his subordinate—*after* all the meetings that the brief in opposition so painstakingly describes.

are "authoritative" under Honduran law, and none is possible: As the Republic's brief explains, *Honduras* has not changed its position, because *two* different Honduran attorneys general, in successive Honduran administrations from different political parties, supported petitioner's position—both before the trial court *and* on appeal—and it cannot reasonably be disputed that the Attorney General of Honduras is the country's sole "legal representative." Br. for Honduras 15-18.

In sum, the Eleventh Circuit's analysis—and in particular its "corruption/finality" rule and its refusal to accord *any* deference to Honduras—conflicts even with the deference formulation adopted by the Second Circuit, a standard that the Acting SG now endorses. For that reason, this case should, at a minimum, be summarily remanded to the court of appeals.

II. The Acting Solicitor General Does Not Adequately Address The Conflicts Identified By The Petition

As the petition demonstrated, the courts of appeals were divided on their *approaches* to the foreign-deference question even before the court below took an even more dramatic departure by according *no* deference. Pet. 16-22. The Ninth and D.C. Circuits, for example, accord *categorical* deference based on the act-of-state doctrine, and the Federal Circuit would follow a similar categorical approach based on this Court's decision in *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825). The Seventh Circuit's deference rule, by contrast, is based on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). Thus, even if the Acting SG were correct in asserting that the Second and Fifth Circuits follow a form of *Skidmore* deference, and in claiming (insupportably) that the court below invoked and correctly applied such a rule, this Court's review would still be needed to instruct lower courts on the correct analytical approach to these important and recurring questions.

1. The Seventh Circuit expressly relied on *Chevron* to hold that a foreign sovereign's views are entitled to deference

so "substantial" as to overcome contrary testimony by legal "expert[s] of the highest skill and repute." *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (per curiam). Indeed, any lower level of deference, in that court's view, is "unacceptable." *Id.* This deference rule is significantly more robust than the *Skidmore* variant proposed by the Acting SG, which essentially treats foreign officials—whether or not authorized to speak for the sovereign—as nothing more than persons likely to be "expert" in foreign law. Opp. 17. The Acting SG expressly disputes that *Chevron* informs the deference due foreign sovereigns (*id.* at 18 n.10), but that disagreement merely confirms the need for plenary review.[4]

2. The Acting SG also has not explained why plenary review is inappropriate despite the *categorical* deference rule followed by the Ninth and D.C. Circuits in reliance on the act-of-state doctrine. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 & n.7 (9th Cir. 1992); *Riggs Nat'l Corp. v. Comm'r* ("*Riggs I*"), 163 F.3d 1363, 1367-68 (D.C. Cir. 1999). The Acting SG asserts that *Richmark*'s analysis was "plainly mistaken" (Opp. 21-22), but a respondent's disagreement with conflicting authority is a reason *for* plenary review, rather than a basis for denying certiorari.[5] As for

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[4] The Acting SG disputes the *Chevron* analogy on the ground that federal agencies' lawmaking authority is a product of express congressional delegation, and because courts have "the responsibility to determine, de novo, the content of foreign law." Opp. 18 n.10. Of course, federal courts review *domestic* questions of law de novo as well, and that has never been thought inconsistent with their duty to defer to federal agencies on such questions under *Chevron*. And by incorporating state and foreign law into the Lacey Act, Congress has, if anything, left the lawmaking authority in the hands of the state or foreign government whose law is borrowed, entitling that government to deference. *Cf. Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941) ("[T]he proper function of the Delaware federal court [applying Delaware law] is to ascertain what the state law is, not what it should be.").

[5] The Acting SG also asserts that *Richmark*'s foreign-law analysis was "dicta," because the Ninth Circuit ultimately upheld the discovery

Riggs I, the Acting SG dismissively characterizes it as "clearly distinguishable" because it "involved the act of state doctrine" and, according to him, the Eleventh Circuit's decision does not "call into question any 'act of state.'" Opp. 21.

That assertion, however, overlooks the fact that the views the Republic has presented are binding law in Honduras. For example, the Agriculture Ministry's adoption of the Human Rights Commissioner's legal conclusions has a substantive impact in Honduras (Br. for Honduras 16)—making it exactly analogous to the Finance Minister's order in *Riggs I*—yet the court below and the Acting SG both assert that the Minister's order is incorrect as a matter of Honduran law. Likewise, the interpretive decree passed by the Honduran Congress is binding throughout Honduras. Nonetheless, the Acting SG characterizes it as a legally erroneous construction of that Nation's Civil Code, just as the court below declared itself "unconvinced" by the decree based on its *own* reading of the Civil Code and of what the Congress had "intended" by the 1995 repealer statute. Pet. App. 30a-31a & n.34. Because the court below and the Acting SG both premise their analyses on the notion that Honduras has misconstrued its own law and thus is misapplying it to Honduran citizens, both the decision below and the government's defense of it conflict with the act-of-state doctrine under *Riggs I*. *See W.S. Kirkpatrick & Co. v. Envt'l Tectonics Corp.*, 493 U.S. 400, 405, 409 (1990).[6]

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request despite the contrary requirements of Chinese law. Opp. 22. But that is clearly wrong: a statement is dictum if it is *unnecessary* to the decision. In *Richmark* the court was required to balance other interests against the foreign law it determined was at issue. *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 544 nn.28-29 (1987). That the foreign law did not carry the day does not mean that the Ninth Circuit was not required to consider it.

[6] The Acting SG's attempted distinction of *Elmendorf*, and the Federal Circuit's case law following it, posits that *Elmendorf* involves deference to foreign *courts* (Opp. 20 n.12), but that assertion misses the point: in Honduras's civil law system, the Congress and the Attorney General

3. Although the Acting SG concedes that foreign law is "regularly implicated in domestic litigation," he contends that review is not warranted because the application of deference principles to such cases likely will be factbound. Opp. 24-25. But that contention relies on the unwarranted assertion that all such cases are governed by amorphous *Skidmore* principles. Even were the latter view correct, review would still be required to correct the Eleventh Circuit's legal error in failing to defer—indeed, the government has sought review, and summary reversal, in such circumstances.[7] And where, as here, the courts of appeals are divided over the correct *mode* of analysis, the Acting SG's bare assertion that such analysis is fact-intensive in *application* assuredly cannot carry the day.[8]

III. The Eleventh Circuit's "Finality" Rule Violates Established Due Process Principles

The Acting SG does not dispute that the due process question presented by this case—whether a criminal defendant

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enjoy interpretive authority comparable to that of the highest court in a common law system.

[7] *See, e.g.*, Petition For A Writ Of Certiorari, *United States v. Mead Corp.*, No. 99-1434, at 22; Reply Brief For The United States, *United States v. Mead Corp.*, No. 99-1434, at 4.

[8] Citing *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), the Acting SG also contends that the situation presented by this case is "rarely encountered." Opp. 23, 24. But *Jota* has nothing to do with this case. The issue there was whether litigation to which Ecuador might be an "indispensable party" could proceed over Ecuador's objection, which raised comity and sovereign-immunity questions. The "changed litigating position" that worried the court occurred when Ecuador, after the case was dismissed, abandoned its objections and sought to intervene as a party defendant. 157 F.3d at 160. It may indeed be "rare" for a party who successfully sought dismissal to change course after judgment and insist on becoming a defendant, but that is very far afield from this case. Indeed, even in that situation, the Second Circuit left open the possibility that the intervention would be granted, by analogy to this Court's practice of accepting the SG's confessions of error. *Id.* at 161 & n.7; Pet. 26 & n.14.

who is exonerated by a subsequent construction of the statute of conviction must be given the benefit of any such construction, notwithstanding any supposed interest in finality—meets the criteria for certiorari. Nor could he: This Court has already recognized in *Fiore v. White*, 531 U.S. 225 (2001) (per curiam), and *Bunkley v. Florida*, 123 S. Ct. 2020 (2003) (per curiam), that this question is one of compelling importance. The Acting SG resists review on this question *only* by asserting that no retroactivity consideration is presented in this case.

The Acting SG, however, is simply attempting to have it both ways. He and the court below both aver that the Republic's view should be disregarded *because* Honduran law has been changed or clarified. But due process would still require application of any such "change" or "clarification" here, despite the Eleventh Circuit's novel "finality" rule, because petitioner's conviction remains pending on direct review. Pet. 28-29. Faced with that realization, the Acting SG now contends—contrary to what the government argued below—that the retroactivity question is governed solely by Honduran law. Opp. 27.[9] As Honduras has again explained, however, any legal changes that favor criminal defendants *are* retroactive under Honduran law. Br. for Honduras 11 n.11. And even if that were not true, the Acting SG has not explained why petitioner—who was indicted and tried by our government in our courts—is not entitled to the same due process rules that this Court applies to every other criminal defendant.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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[9] .The United States asserted below that "the United States' retroactivity provisions apply." *E.g.*, U.S. C.A.11 Br. (Nos. 02-10810-JJ & 02-11264-JJ), at 44; *see* U.S. Response, S.D. Ala. Dkt. # 387, at 14 n.5.

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Nos. 03-622 & 03-627

In The
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♦———♦

DAVID HENSON MCNAB,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

♦———♦

ROBERT D. BLANDFORD, ABNER SCHOENWETTER,
AND DIANE H. HUANG,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

♦———♦

On Petition for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

♦———♦

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITIONERS

♦———♦

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IN THE
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On Petition for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITIONERS

♦

INTEREST OF AMICI

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent bar organization advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has more than 10,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer

members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization in its House of Delegates. NACDL promotes study and research in the field of criminal law. NACDL has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice. In furtherance of its objectives over the past decade, NACDL frequently files *amicus* briefs with this Court on various criminal justice issues. *See* NACDL's website at www.nacdl.org.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses from restaurants to manufacturing firms to bowling alleys.

The NFIB Legal Foundation is concerned about the effect of the increasing number of regulatory crimes on small business. Small businesses, like the Petitioners, are required to comply with a myriad of Federal and State regulations. Not surprisingly, many well-meaning, small-business owners are unaware of all of their legal obligations. Because failure to observe a regulatory obligation often carries a criminal penalty, this reality is particularly troubling. Even more disturbing are cases, such as this one, in which small business owners are convicted for regulatory crimes absent specific intent, and based upon the application of uncertain foreign law.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Members of NAM are subject to the increased use

of criminal penalties in the regulatory state and to the uncertainty that attends the obligation to comply with laws and regulations of multiple (domestic and foreign) jurisdictions whose own construction of those laws is often ambiguous.

National Wilderness Institute ("NWI") is a private, non-profit conservation organization best known for its authoritative studies of wildlife conservation programs. Although NWI publications cover all environmental issues, endangered species conservation has been a particular focus of the organization. NWI studies have revealed shortcomings in current wildlife programs that often limit their effectiveness and waste conservation funds.

Since its founding in 1989, NWI has advocated new approaches to environmental problems including the use of market incentives and technological advancements as a way to improve the environment. These views sometime set it apart from other environmental groups. The American Conservation Ethic, available at the web site www.nwi.org, sets forth NWI's general principles.[1]

SUMMARY OF ARGUMENT

Review in these cases is warranted.[2] Petitioners' eight-year sentences for the effectively *scienter*-less regulatory offense of importing lobster tails in violation of non-existent Honduran law should be reversed.[3]

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[1] Counsel for the parties have consented to the filing of this *amicus* brief; the letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici* or their counsel.

[2] Petitioner McNab (No. 03-622) and Petitioners Blandford, Schoenwetter, and Huang (No. 03-627) have filed separate petitions. The United States has chosen to file a consolidated response and this *amicus* brief is directed to the issue presented in both petitions – the applicability of foreign law to domestic regulatory conduct.

[3] Petitioners McNab, Blandford and Schoenwetter were each

The convictions and sentences result from the confluence of two events – the expansion of the reach of the Commerce Clause powers of the Federal government and this Court's determination in *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57 (1910) that the State may "eliminate the question of intent" from any criminal provision without violating the Due Process clause of the Fourteenth Amendment. These developments have led, inevitably, to the complete erosion of the *mens rea* requirement and the expansion of the concept of "public welfare offense." Today, in effect, one who acts in any business or social capacity (as Petitioners did) is subject to what Justice Stewart characterized as a form of "absolute liability." *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 569 (1971) (Stewart, J., dissenting).

These Petitions emphasize the importance of these two doctrinal developments and demonstrate the potentially pernicious applications of these doctrines to regulatory matters involving the application of foreign law. The reconfiguration of criminal law through a concerted, long-term crusade to dilute traditional criminal intent requirements allows the government to engage in grotesque over-charging such as that demonstrated here – pyramiding trivial civil infractions of uncertain (and now disavowed) foreign law into smuggling and money laundering offenses that carry astronomical and unjust domestic criminal penalties.

No reasonable observer can doubt that the scope of substantive criminal law has expanded enormously. Today it is called into the service of an extraordinary range of purposes. Beyond its original function of minimizing violent behavior threatening to lives and property, criminal law is now also used to regulate economic enterprise, protect the environment, correct relations among races and genders, and alter habits of consumption of liquor, drugs, and sex. *See, e.g.*, R. Pound, Criminal Justice in America 23 (1930).

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sentenced to 97-month terms of imprisonment. Petitioner Huang was sentenced to a two-year term of imprisonment.

As the Court has long noted, the origin of the public welfare doctrine lay in the belief that "public welfare" offenses typically involve only modest penalties. *E.g. Morissette v. United States*, 342 U.S. 256, 256 (1952) ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). For this reason, the Court has often approached (but never adopted) a rule of construction that would delimit the "public welfare" doctrine and attendant reductions in the *mens rea* requirement to those cases where a "harsh penalty" is not imposed. *See Staples v. United States*, 511 U.S. 600, 616 (1994).

There can now be little doubt that the fundamental premise of this Court's "public welfare" jurisprudence – the presumed modest nature of the criminal penalties attending such offenses – is, as this case painfully demonstrates, false to fact. The foundations of the doctrine have been undermined and review of the doctrine's unwarranted application to Petitioners -- whose alleged violation of a now-disavowed foreign civil law is the sole basis for prosecution -- is therefore appropriate.

ARGUMENT

This Court's plenary review is warranted because the decision of the Eleventh Circuit improperly expands and misapplies the concept of "public welfare offense" to a case involving regulatory "crimes" that have severe domestic penalties despite involving violations only of foreign law that would, if prosecuted in that foreign country be, at most, trivial civil infractions. The issue presented – the interpretation of foreign law and its criminal application to American businesses engaged in an increasingly global economy -- is one of surpassing importance inasmuch as the growth of the American regulatory state has rendered the criminal law applicable to virtually all domestic (and now foreign) productive social and economic conduct.

I. The Question Presented Involves An Issue of Public Importance And Wide Application.

As the scope of the criminal law has expanded, the trend has been to criminalize conduct even where the alleged criminal has acted with diminished, or non-existent intent. While this Court has often noted the fundamental importance of the concept of *mens rea* in our criminal law, the actual treatment of that concept has been reduced to one of statutory interpretation. Not since the early part of the last century has the Court considered whether there are constitutional dimensions to that concept; and its treatment of *mens rea* in that era was, in the words of one noted scholar of criminal law, "flimsy. . .dictum." That dictum has since became a doctrine of "constitutional law that severe criminal punishment may be inflicted at the legislature's will, regardless of whether the defendant had any opportunity to conform his conduct to the requirements of law." H. Packer, "Mens Rea and the Supreme Court," 1962 Supreme Court Review 107, 116.

But that flimsy dictum now has widespread effect. That effect can be felt in all domestic economic and social activity and, as these Petitions demonstrate, now portends palpable effects on those engaged in foreign trade. It would be easy to think that the question presented in these Petitions is of little practical importance – easy, but wrong. The reality is that "public welfare" crimes are a growth industry.

1. Estimates of the current size of the body of federal regulatory criminal law vary. The American Bar Association reported in 1998 that there were in excess of 3,300 separate federal criminal offenses. *See* American Bar Association, *The Federalization of Criminal Law* (1998), Appendix C; *see also* Ronald L. Gainer, "Federal Criminal Code Reform: Past and Future," 2 Buff. Crim. L. Rev. 46, 53 (1998). More than 40 percent of these laws have been enacted in just the past 30 years, as part of the growth of the regulatory state. *See Federalization of Criminal Law* at 9 & 11 (Chart 2). These laws are scattered in over 50 titles of the United States Code,

encompassing roughly 27,000 pages, *see* Gainer, *Federal Criminal Code* at 53, rendering them effectively unknowable.

Worse, the statutory code sections often incorporate by reference the provisions and sanctions of administrative regulations promulgated by various agencies under congressional authorization. Estimates of how many such regulations exist are even less well settled, but the ABA thinks there are "[n]early 10,000." *Federalization of Criminal Law* at 10.

And the growth in the scope of criminal law is, if it is possible, exacerbated by statutes such as the Lacey Act, which criminalize violations of foreign laws (and, arguably, foreign regulations). In this age of globalization, even small and mid-size businesses are likely to engage in both domestic and foreign operations. It simply beggars the imagination to envision how a conscientious businessman might inform himself of the laws (and regulations!) of more than 190 nations. Yet, the construction given the Lacey Act in this case requires such an effort, criminalizes the failure to do so, and, through the magic of money laundering statutes, imposes a cruel and severe eight-year penalty on those who, in the prosecutor's discretion, are deemed worthy of punishment.

2. Nor is the growth in the number of federal criminal statutes merely an academic question, without real world effects. Another measure of the extent to which criminal enforcement of regulatory prohibitions has grown is the resources that have been devoted to the effort. In 2002 (the latest year for which data is available), for example, the Fish and Wildlife Service had 772 sworn law enforcement officers; the Forest Service another 658; Bureau of Land Management – 235; Environmental Protection Agency – 220; Food and Drug Administration – 162; and the National Marine Fisheries Service (whose prosecution is directly at issue in this case) employed 137 law enforcement officers. *See* Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2002* (http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf). There can

be little doubt that the Federal government expects results from its investment of these resources.

And those results are evident. Between March 2001 and March 2002 (again, the latest year for which data are available), federal prosecutors commenced 62,957 cases, involving 83,809 individual defendants. *See* Administrative Office of United States Courts, "Federal Judicial Caseload Statistics," Table D-2 (http://www.uscourts.gov/caseload2002/contents.html). More than 3,100 of these defendants were charged with crimes categorized as violations of "federal statutes" -- a category broadly (though not precisely) congruent with charges reflecting violations of a regulatory program. *Id.* This number exceeds the number of federal prosecutions during the same year for a host of common law offense categories, including murder, robbery, embezzlement, forgery, and sex offenses. Put another way, more federal prosecutorial resources are invested in regulatory prosecutions than in the prosecution of forgery charges. *Id.*

And even these statistics understate the impact of the specter of criminal regulatory enforcement. Offenses involving productive economic and social conduct are uniquely subject to risks of over-deterrence. Unlike common law crimes, for which motivations of passion or circumstance often overcome calculation, the world of economic and social conduct is especially responsive to the *in terrorem* effect of criminal sanctions. As a consequence, the mere threat of criminal penalties becomes a tool in the arsenal of civil regulators to coerce compliance with otherwise ill-justified regulatory regimes. For example, one NFIB member, a home health-care provider, recently was compelled to settle with the local prosecutor, who threatened the company with criminal proceedings, fines, and jail. The company reported the Medicaid fraud of one of its employees, whom it fired. In terms redolent of a gangster novel, the prosecutor's office attempted to extract a six-figure fine from this company *before* any criminal charges were filed. This small, respectable business with a clean healthcare claims record settled simply "to make

the case go away," fearing local reprisals and negative publicity.

To be sure, many of these effects are solely domestic. But the foreign law interpretation question at the core of the instant Petitions is a natural outgrowth of these developments. Because social and economic conduct is, as we next demonstrate, subject to an unusual form of near-absolute liability, the structure of laws has the inevitable and essentially *unmeasurable* effect of causing social and economic actors to forego productive, beneficial conduct rather than risk the capricious exercise of prosecutorial discretion. Put more directly, Petitioners' case cannot possibly have been calibrated to achieve an appropriate level of societal deterrence.

Plainly, the importation of food into the United States is a socially beneficial activity – it feeds American citizens. Yet the inevitable effect of the excessive eight-year sentences rendered can only be the over-deterrence of this conduct. Costs will rise; fewer imports will enter the United States; and, in the end, Americans will have fewer gastronomic choices. One rather doubts the utility of this or that Congress intended such a result.

3. The facts of this case readily demonstrate how a simple public welfare offense, involving only modest penalties, can be transmuted through prosecutorial discretionary decision-making into a harsh felony prosecution. Underlying Petitioners' "crime" was a relatively straightforward civil violation of Honduran law (assuming, that is, that Honduran law had any legal application at all). That Honduran civil law in turn became the predicate for a mere *misdemeanor* violation of the Lacey Act, prohibiting the importation of "fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law," 16 U.S.C. § 3372(a)(2)(A).[4] Yet Petitioners' simple regulatory

[4] Petitioners Blandford and Huang were convicted of both misdemeanor and felony Lacey Act violations. For the misdemeanor convictions, the jury was instructed that they could be convicted if they knew or "should have known" of the underlying foreign law and regulations. Moreover, the jury instruction with respect to the felony

offenses somehow mutated into a criminal matter of near cataclysmic proportions.

Thus, though the bulk of the shipment of "illegal lobster tails" originally seized was not, in fact, "illegal" (save in the sense that they were packaged incorrectly) Petitioners' regulatory violation was creatively used as the predicate for a felony smuggling charge (a general intent crime) alleging the importation of goods into the United States "contrary to law." *See* 18 U.S.C. § 545. This smuggling charge, in turn, became the predicate for money laundering charges, *see* 18 U.S.C. § 1956(a), where the "money laundering" in question was nothing more than the normal commercial transaction of importing, paying for, and depositing the proceeds from the sale of the seafood in question in a bank account. *Cf. United States v. Scialabba*, 282 F.3d 475, 476 (7th Cir. 2002) (expressing doubt that Congress intended to criminalize use of funds that do not entail financial transactions "to hide or invest profits in order to evade detection, the normal understanding of money laundering"). As a consequence, Petitioner McNab is now serving a draconian sentence of 97 months imprisonment. Petitioners Blandford and Schoenwetter were sentenced to the same staggering prison terms, while Petitioner Huang was incarcerated for only two years. All for violating a foreign law and foreign regulations whose existence may not have been known to the defendants and whose construction is the subject of substantial doubt.

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charges against defendants required only that they be shown to have known that they violated foreign law – not any specific statutory or regulatory provision.

II. The Absence Of *Mens Rea* Requirements In Public Welfare Offenses Demands Certainty In The Determination of Foreign Law By Foreign Governments.

There would be relatively little difficulty with uncertainty in the determination of foreign law if actual knowledge of foreign laws were an element of federal offenses alleging their violation. As we next demonstrate, however, the Federal government has made a concerted effort to drain all regulatory criminal law of any intent requirement – an effort that demands a concomitant certainty in the determination of foreign law.

1. The requirement that a crime involve culpable purposeful intent has a solid historical grounding. As Justice Robert Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette, 342 U.S. at 250-51. Thus, the very earliest English common law recognized that one who intended to commit an act (say injuring a horse) and who mistakenly committed a different crime (killing the horse) could not be said to have intended the graver crime of intentionally killing the animal. *See Dobbs Case*, 2 East P.C. 513 (1770); *see also Thacker v.*

Commonwealth, 134 Va. 767, 114 S.E. 504 (1922) (defendant shot at a light and struck and killed a victim; not guilty of murder); *State v. Peery*, 224 Minn. 346, 28 N.W.2d. 851 (1947) (requiring proof of "intent to be lewd" in indecent exposure prosecution of defendant who was accidentally viewed through ground floor window by passers-by).

But this conception of intent (or what the Model Penal Code drafters called "purpose") -- that is, a conception necessitating proof that a defendant intended both to do the act which constituted the offense and to accomplish the particular harm prohibited -- did not long survive even in the common law. English and American courts have now come to the view that in most legal contexts a criminal actor who intends to engage in an act is liable for whatever harm eventuates, even if it is different from that which was within his original contemplation. *E.g. State v. Wickstrom*, 405 N.W.2d 1 (Ct. App. Minn. 1987) (defendant hit victim causing abortion of pregnancy; guilty of criminal abortion despite lacking intent to injure fetus). In the words of the Model Penal Code one can act "knowingly" or with the general intent to do the acts which constitute the offense without regard to any specific intent to do a wrongful act or violate a law. *E.g. People v. Garland*, 254 Ill.App.3d 827, 627 N.E.2d 377, 380-81 (1993) ("Specific intent exists where from the circumstances the offender must have subjectively desired the prohibited result. General intent exists when the prohibited result may reasonably be expected to follow from the offender's voluntary act even without any specific intent by the offender.").

2. This development has perverse consequences in the context of the rise of the "regulatory state" and the resulting growth in the cluster of problems involving the relationship of the criminal law to the conduct of economic enterprise. In the context of regulatory offenses the concept of intent has diminished, departing from its traditional understanding.

Building on the time-honored maxim that "ignorance of the law is no excuse," for example, courts now routinely conclude that one can be convicted of a crime for having acted knowingly

(that is purposefully doing an act) without the additional requirement that the government prove that the defendant had a conscious desire to achieve a particular end or to violate a known legal duty (typically one found in the form of a statutory or regulatory prohibition). Thus violations of the Sherman Antitrust Act require only proof of deliberate business conduct without proof of intent to monopolize or intent to violate the law. *E.g. United States v. United States Gypsum Co.*, 438 U.S. 422, 445–46 (1978).[5]

This description of the *mens rea* requirements that have developed in the regulatory context is deeply troubling. It makes clear the extent to which actors in a highly regulated industry are subject to criminal liability for their unknowing acts. Though the law often requires that they have acted "knowingly" -- a seeming protection from the imposition of strict liability -- that requirement is but a parchment barrier to what is, in effect, the imposition of absolute liability. Proof that one in fact lacked knowledge of the regulatory requirement at issue is, uniformly, no defense to the prosecution. *E.g. International Minerals & Chemical Corp.*, 402 U.S. at 565 ("[W]here * * * dangerous or deleterious materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

A common example illustrates the point: Consider, the crime of "knowingly filing a false monitoring report" under the Clean Water Act. *See* 33 U.S.C. § 1319(c)(4) (making it a crime to knowingly make a false statement in any certification required by the regulations promulgated by Environmental

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[5] Notably, in this example, a corporate executive will at least know that his company's market share is increasing, alerting him to circumstances that might warrant inquiry. In complex health, safety and environmental regulatory regimes there is often nothing extrinsic that will alert the average businessman to the proscribed nature of this conduct. Similarly, in today's global marketplace there is often no indication of a potential violation of foreign laws or regulations.

Protection Agency), *and* 40 C.F.R. § 122.41(*l*)(4) (requiring compliance with permit requirements, which require the filing of a "discharge monitoring report").[6] The law that defines what is false or misleading is part of a large regulatory scheme that also includes a regulatorily-imposed obligation on each individual to insure the accuracy of any reports made. As a consequence, the only showing the government must make to the satisfaction of a jury is that the defendant has "knowingly filed" the report, irrespective of whether or not he actually knew it was false. And since nobody files a report without doing so intentionally (reports do not get signed, sealed, and mailed by accident or mistake), the only showing necessary is the trivial showing that the defendant has purposefully put a letter in the mail. As Justice Potter Stewart noted: "As a practical matter, therefore, they are under a species of absolute liability for violation of the regulations despite the 'knowingly' requirement." *International Minerals & Chemical Corp.*, 402 U.S. at 569 (Stewart, J., dissenting).

Petitioners' case illustrates the point (and the dangers) readily. The underlying premise for the indictment and convictions is that Petitioners violated the Lacey Act by importing and selling lobster tails that allegedly were in violation of three Honduran laws, resolutions, and regulations. Yet, for more than six months the federal government was unable to discern what, if any, Honduran regulations had been violated. That uncertainty was no barrier to prosecution -- the Lacey Act, (like other regulatory criminal laws), does not require the Government to demonstrate that Petitioners had actual knowledge of those Honduran laws. Nor is it an element of the offense to prove that they had more generalized knowledge of the prohibitions of the Lacey Act. Indeed, for a misdemeanor violation the "should have known" standard suffices.

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[6] As this brief exegesis demonstrates, even discerning that the law criminalizes the filing of a false report is, itself a problematic endeavor.

Thus, all that is required is a showing that a defendant was aware of the nature of his or her conduct -- a showing that is trivial in the regulatory context as no economic actor routinely engages in business conduct by accident or without knowledge of the nature of his conduct. Rather he acts (as here by importing goods) with a purpose and, under current legal doctrine that purposeful act puts him on notice as to the entire panoply of attendant laws and regulations – a panoply that, under the Lacey Act, includes the laws and regulations of *every* foreign country. Moreover, this rule of law applies *even if* (as here) the construction and interpretation of those laws is indefinite and subject to dispute even by the sovereign who has adopted them. Contemporary regulatory criminal law thus dispenses with any pretence that it criminalizes the conduct only of those who have a wrongful intent.

3. What is particularly disturbing about the trend toward diminished intent requirements is that it is exacerbated by a trend toward significantly harsher penalties. Historically, when the courts first considered regulatory laws containing reduced intent requirements, the laws uniformly provided for very light penalties such as a fine or a short jail term, not imprisonment in a penitentiary. *See Staples*, 511 U.S. at 616 (citing *e.g. Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine up to $200 or 6 months in jail); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (fine only); *People v. Snowburger*, 113 Mich. 86, 71 N.W. 497 (1897) (fine up to $500 or incarceration in county jail)).

As early commentators noted, modest penalties are a logical complement to crimes that do not require specifie intent. *See* Francis B. Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55, 70 (1933); *see also Morissette*, 342 U.S. at 256 ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). Indeed, initially some courts questioned whether any imprisonment at all could be imposed in the absence of intent and culpability. *E.g. People ex rel. Price v. Sheffield Farms-Slawson-Decker, Co.*, 225 N.Y. 25, 32–33, 121 N.E. 474, 477 (1918) (Cardozo, J.);

id. at 35, 121 N.E. at 478 (Crane, J., concurring) (imprisonment for crime that requires no *mens rea* stretches law of regulatory offenses beyond its limitations). But this historical view has now been lost. Regulatory laws with reduced *mens rea* requirements are often now felonies. *E.g. United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (felony violation of Clean Water Act—no knowledge of regulations necessary).[7]

And, through the pyramiding of serious felonies on top of minor regulatory offenses, even modest crimes can be "enhanced" into significant terms of imprisonment. For example, in Fiscal Year 2001, the average term of imprisonment for Environmental and Wildlife offenses in the Eleventh Circuit was only 9.6 months. *See* United States Sentencing Commission, Federal Sentencing Statistics By State, District & Circuit, Table 7 ("Average Length of Imprisonment By Primary Offense Category") (2001) (http://www.ussc.gov/judpack/2001/11c01.pdf). The contrast between this modest penalty and the 97-month sentence that three of the Petitioners received for their own "wildlife" offense is self-evident.

4. As Justice Thomas recently wrote in a different domestic regulatory context (involving construction workers), the broad view of the appropriate scope of criminal law adopted by the Eleventh Circuit in this case "expose[s] countless numbers of . . . workers to heightened criminal liability for using ordinary devices to engage in normal industrial operations." *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of certiorari). Supreme Court precedent, has

> never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to

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[7] And even misdemeanor offenses can, through the stacking of sentences, result in substantial terms of incarceration *E.g. United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (misdemeanor convictions stacked for 3 year sentence).

> extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety.

Id. So, too, presumably, with lobster importers, or sewage treatment workers, or automobile manufacturers, accountants, bartenders, garbage collectors, sports referees, or even (dare we say) lawyers.

In short, historical changes in the *mens rea* requirements have been substantial. The criminal law today is far different from the criminal law of 100 years ago. For regulatory crimes there is, in effect, a standard of near-absolute liability. This interpretation of regulatory statutes with increasingly onerous criminal penalties has lost sight of a fundamental truth: "If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary." *Weitzenhoff,* 35 F.3d at 1293 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

Put another way, given the comprehensive nature of regulation in America society today, the growth of the public welfare doctrine has, in effect, led to the abandonment of any intent requirement for virtually the entire range of commercial, social, and economic activity in the marketplace. This situation is fundamentally wrong. For as the drafters of the Model Penal Code said:

> It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and

> should mean condemnation, and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised.

American Law Institute, Model Penal Code § 2.05 and Comments at 282–83 (1985).

This case is a paradigmatic example of how these expansive doctrines of liability can be misapplied to a context in which the scope of the underlying laws are uncertain, at best. Petitioners' manifestly unjust eight-year sentences for the importation of lobster tails -- without knowledge of the underlying Honduran regulations and without clarity in Honduran law on the construction of those regulations -- call out for correction.

The criminal law has moral foundations. At some point a limit on the ability of a legislature to criminalize social conduct must exist. We submit that these Petitions have reached that point: When the judicial system punishes with extraordinary sanctions conduct that lacks any criminal intent and that violates a foreign law, which the foreign government itself now disclaims, review is appropriate.

Had the Eleventh Circuit appropriately deferred to the considered position of the government of Honduras there would have been no scope for the application of the pernicious doctrines we have identified. The existence of these expansive doctrines of criminal liability demands, at a minimum, judicial deference to the foreign law determinations of a foreign government.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

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IN THE

Supreme Court of the United States

DAVID HENSON MCNAB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE REPUBLIC OF HONDURAS THROUGH ITS EMBASSY AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Republic of Honduras is represented in the United States by the Embassy of Honduras.[1] The Embassy's duties include safeguarding the rights of Honduran citizens in the United States and ensuring proper interpretation of Honduran law by courts in the United States.

Petitioner McNab is a citizen and resident of Honduras. Petitioner's conviction rests upon judgments about the interpretation and validity of Honduran fishing laws. Honduras appeared as an amicus curiae in the United States Court of Appeals for the Eleventh Circuit. It presented Honduran court decisions, legislative decrees and a declaration from its highest-ranking legal official. All conveyed the official sovereign position regarding the scope and validity of the foreign laws charged in the indictment. Those materials conclusively established that those laws had no force or effect in Honduras at the time of Mr. McNab's conduct. The Eleventh Circuit rejected Honduras' official views in favor of its own erroneous reading of Honduran law.

Honduras applauds the efforts of the United States to enforce international environmental standards, and it supports global initiatives to protect our ecosystem. Indeed, Honduras has continued to strengthen its environmental laws and regulations for this very purpose. In this case, where no violation of environmental law occurred, Honduras' interest is to ensure that the United States applies and enforces Honduran laws in an equitable manner that is consistent with their applicability within Honduras. It also desires to protect its citizens from misapplication of Honduran law. Honduras submits this amicus curiae brief to explain its system of government and laws, as well as the history and interpretation of the legal provisions on which Mr.

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[1] Respondent and petitioner have filed letters consenting to the filing of this brief with the Clerk of Court. Pursuant to Rule 37.6 of this Court, amicus states that no counsel for a party authored this brief in whole or in part, and no person, other than amicus and its counsel, made a monetary contribution to the preparation or submission of this brief.

McNab's conviction is based.[2] As this explanation reveals, Mr. McNab's actions did *not* violate any valid or enforceable law in Honduras.

SUMMARY OF THE ARGUMENT

Mr. McNab's conviction was predicated on a conclusion that he imported lobsters in violation of three "foreign laws": (1) a Honduran administrative rule restricting the size of kept lobsters; (2) a Honduran regulation specifying packaging requirements for lobsters; and (3) a Honduran statute prohibiting, *inter alia*, the harvest and destruction of eggs of aquatic species. The Eleventh Circuit unjustifiably rejected Honduras' official statement that none of the three laws was valid or enforceable against the conduct alleged in the indictment. It upheld the conviction despite evidence that: (1) a Honduran appeals court had annulled the size rule, declaring it void; (2) the Honduras National Congress had effectively repealed the packaging regulation before the lobster shipments in this case occurred; and (3) the egg-harvesting law had been interpreted by Honduras' Attorney General *not* to cover the conduct specified in the indictment, and had also been amended by the Honduran Congress retroactively to eliminate *any* proscription on such conduct.

A panel majority of the Eleventh Circuit substituted its own interpretation of Honduran laws for that of the Honduran government. It based this extraordinary, unilateral approach on what it termed a "posttrial shift in the Honduran government's position regarding the validity of the laws at issue in this case" (Pet. App. 20a (footnote omitted)), and on the asserted need for "finality with representations of foreign law by foreign governments" (*id.* at 23a). But as the

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[2] This brief, and the representations of Honduran law articulated herein, have been reviewed and approved by the Office of the Attorney General of Honduras. The Attorney General, Sergio Zavala Leiva, is authorized by the Republic of Honduras to offer its official legal position, and has provided a declaration to this Court in support of this brief. App. 11a n.1. Because the declaration was finalized and translated shortly before filing, the United States did not receive it until this brief was served.

dissenting judge below correctly noted, the official position of Honduras never changed. *Id.* at 35a-36a. The testimony cited by the Eleventh Circuit as the supposed "original position" of Honduras represented the personal views of bureaucrats who lacked authority to offer opinions on behalf of Honduras. The official position of Honduras—offered first to the trial court in an affidavit of its then-Attorney General, Hector Ramon Tróchez, and later to the court of appeals in a declaration by its current Attorney General, Dr. Sergio Zavala Leiva, and an administrative ruling from its Minister of Agriculture and Livestock—at all times recited a consistent view that the predicate offenses lacked force and effect at the time of Mr. McNab's conduct.

That the personal opinions of individual bureaucrats who offered testimony credited by the district court were ultimately proven wrong in the ordinary course of legislative, administrative and judicial proceedings in Honduras in no way supports the view that Honduras' official position changed after trial. Instead, it demonstrates conclusively that prior to exhaustion of Mr. McNab's direct appeal, the proper mechanisms for obtaining legal rulings and opinions in Honduras regarding the effect of Honduran law produced unanimous, unequivocal judgments from final decision-makers in all three branches of government, each concluding that the conduct charged here did not, in fact, violate any valid, enforceable Honduran law.

The Eleventh Circuit established a separate "finality" rule for convictions based on "foreign law," refusing to recognize any post-trial official clarification of "foreign law" that would contradict a district court's findings. Its explanation for this rule betrays a cynical view that foreign officials are generally susceptible to improper influence by persons "who ha[ve] the means and connections." Pet. App. 24a. Honduras takes great exception to the implication that its laws are for sale to the highest bidder. As there is absolutely no support for the Eleventh Circuit's musings in this regard, this Court should clarify, consistent with the law of other circuits, that a presumption of regularity applies to the acts of foreign governments. If left in place, the Eleventh

Circuit's standard for determining foreign law will undermine the United States' relations with Honduras and other countries, and will deter beneficial trade.

FACTUAL STATEMENT

Petitioner was convicted of conspiracy, smuggling and money laundering based upon shipments of lobster from Honduras to the United States between August 30, 1996, and February 4, 1999. Each count of conviction required proof that he violated the Lacey Act, 16 U.S.C. §§ 3372 *et seq.* The Lacey Act, in turn, requires proof that Mr. McNab imported "fish or wildlife taken, possessed, transported or sold . . . *in violation of any foreign law.*" Pet. App. 93a (emphasis added). The jury's verdict rests upon alleged "foreign law" violations of three independent Honduran legal provisions: (1) keeping undersized lobsters, in violation of Resolution 030-95; (2) using plastic bags, instead of boxes, to transport lobsters in violation of *Acuerdo* 0008-93; and (3) harvesting egg-bearing lobsters, in violation of Decree No. 154. As Honduras demonstrated in the Eleventh Circuit, *all three* legal provisions lacked force or effect in Honduras at the time of the shipments alleged in the indictment. Thus, Mr. McNab did not violate any "foreign law" charged in the indictment.

1. Honduras' System Of Laws And Government

Honduras is a constitutional Republic, with a civil law legal system based principally upon written laws. *See* Pet. App. 10a-11a n.13; App. 11a. The Honduran Constitution is the supreme law of the land. Pet. App. 11a. Beneath the Constitution, there are two forms of Honduran laws at issue in this case: (1) "decrees," which are akin to statutes; and (2) "*reglamentos*," which are akin to regulations of general applicability. In addition, "Resolutions," which are distinct from *reglamentos,* represent administrative decisions that ordinarily resolve a procedure or dispute in which private persons are involved as parties. *See* Pet. App. 10a-11a n.13, 258a, 283a. Sovereign authority to enact, enforce and inter-

pret these laws is shared among the legislative, executive and judicial branches of the Honduran government.

a. The Legislative Branch. The National Congress has the sole authority to create, decree, interpret or revoke statutory "decrees." *See* Pet. App. 258a. When the Congress exercises its power to interpret statutes, such "interpretive laws" state what the law has been from the date the statute was originally enacted. *Id.* at 269a; App. 14a, 22a. In a civil law system, interpretive decrees have effects similar to Supreme Court decisions in common law countries; thus, Honduran courts must accept interpretive decrees "without debate." App. 15a.

When the Congress expressly repeals a statute, regulations promulgated under that statute are thereafter without legal effect, unless the repealing decree expressly states the contrary. Pet. App. 408a-409a (Decree No. 198-2001, interpreting Article 43 of the Civil Code); *see also id.* at 71a (Article 43). Moreover, when a provision of law is repealed or amended in a manner favorable to an accused in a criminal case, the Constitution provides that such change operates retroactively to the benefit of the accused. *Id.* at 415a.

The Congress appoints the Attorney General of the Republic. App. 11a n.1. The Constitution makes the Attorney General responsible for "the Legal representation of the State." Pet. App. 417a (Hond. Const. Art. 228). As legal representative of Honduras, the Attorney General has authority and legitimacy to declare the position of the Republic as to the scope and validity of Honduran laws. *Id.* at 257a, 192a; App. 11a n.1.

b. The Executive Branch. The President is the ultimate representative of the Executive Branch. Pet. App. 261a. He enforces decrees issued by the Congress. *See id.* at 275a (Hond. Const. Art. 245(1)). To that end, the President issues *reglamentos* ("regulations").[3] The Constitution

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[3] A *reglamento* is one type of rule that must be issued in the form of an *acuerdo*. *Id.* at 256a (quoting Article 118 of the General Law of Public Administration); *id.* at 276a (Hond. Const. Art. 245(11)); *id.* at 280a (Hond.

vests the power to issue regulations exclusively in the President absent express delegation to the contrary. Pet. App. 258a (citing Hond. Const. Art. 321); *see also id.* at 296a. As the former Attorney General of Honduras declared in July 2000 (well after Mr. McNab's conduct in this case), the President retained sole authority to issue regulations pursuant to Honduran fishing laws. *Id.* at 255a; *see also id.* at 381a-382a (Decree No. 154, Art. 5).[4]

The Ministry of Agriculture and Livestock is an agency within the Honduran executive branch.[5] The Minister[6] for Agriculture and Livestock is the head of that agency and reports to the President. Pet. App. 261a. The Ministry of Agriculture and Livestock contains several directorates charged with enforcing laws. The General Directorate of Fisheries and Aquaculture (DIGEPESCA) enforces fishing laws, such as Decree No. 154 (the Fisheries Law of 1959). *Id.* at 4a n.2. The General Directorate of the National Agriculture and Livestock Health Service (SENASA) enforces hygiene laws and regulations. *Id.* at 5a n.3.

c. The Judicial Branch. The Honduran Court of First Instance of Administrative Affairs and the Court of Appeals of Administrative Matters resolve disputes related to administrative matters and public law. They act by issuing judgments, including declarations that regulations are invalid. Pet. App. 259a; *id.* at 418a. Parties subject to regulations may bring the equivalent of a declaratory judgment action challenging their validity in those courts, even if no

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Const. Art. 321). An *acuerdo* in translation means "agreement," "decision," or "accord." Pet. App. 258a.

[4] Sometime after July 2000, the President issued an *acuerdo* expressly delegating to the Minister of Agriculture and Livestock authority to promulgate regulations over certain aspects of the fishing laws, such as closed seasons. *See Acuerdo* 1098-01, Article 16.

[5] This Ministry was formerly known as the Department of Natural Resources. This brief uses the names interchangeably.

[6] The Ministers for individual executive branch ministries are also known as "Secretaries of State." Pet. App. 261a.

enforcement action is pending. *Id.* at 288a. Likewise, in enforcement actions, courts may declare that regulations are without legal effect. *Id.* at 418a (Law of the Jurisdiction of Administrative Affairs, Article 30). A court's interpretation of law has no stare decisis effect (App. 13a) and may be superseded by legislative decree, pursuant to the legislature's power to issue binding interpretations of law.

2. Fishing And Hygiene Laws In Honduras

a. The Honduras Fisheries Law of 1959. In 1959 the Congress enacted Decree No. 154, the Honduras Fisheries Law. Pet. App. 379a-400a. Its stated object is the "consevation, propagation, exploitation, marketing and industrializtion of the nation's . . . maritime fauna." *Id.* at 380a. The law enumerates rights and obligations of fishermen, provisions concerning the granting of permits for fishing, rules concerning closed seasons for various species, and rules for private and governmental hatcheries. It empowers "[t]he Executive Branch, through the Secretariat of Natural Resources," to constrain certain activities through regulations. *Id.* at 381a.[7] Article 45 of the Fisheries Law expressly states that "the legal size of the captured species . . . will be the subject of the regulations for this law." *Id.* at 390a.

b. The Law for the Industrialization of Meats. In 1973 Decree No. 40 ("the Meat Law") was enacted, authorizing the issuance of regulations to establish standards for the processing of meat for human consumption. On January 13, 1995, Decree No. 157-94 expressly repealed Decree No. 40 in its entirety. Pet. App. 404a-406a.

3. The "Foreign Law" Bases For Conviction

a. Resolution 030-95 (lobster size). On December 5, 1995, the Minister of the Department of Natural Resources and the General Director of DIGEPESCA issued Resolution

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[7] Both the Attorney General and Honduran courts have interpreted this language to require the President (and not the Minister) to issue the fishing regulations. Pet. App. 255a; 295a-296a; 303a.

030-95. Pet. App. 401a-403a. The Resolution states: "The minimum size to keep a lobster should be 5.5 inches or 14.5 centimeters of abdominal length." *Id.* at 403a.

In an affidavit presented by Mr. McNab to the district court, the incumbent Attorney General of Honduras, Hector Ramon Tróchez, provided an official opinion that Resolution 030-95 was not properly considered a resolution, but rather was a regulation that had not been issued in the proper form of an *acuerdo.* Pet. App. 256a. Mr. Tróchez explained that a "resolution" that purports to exercise general regulatory authority has "absolute invalidity" unless the requirements for a regulation are otherwise met. *Id.* at 255a-256a. Moreover, he stated, the Fisheries Law requires that "measures of captured species" be set only through regulations. *Id.* at 255a. He testified, therefore, that Resolution 030-95 was "invalid," because the officials who issued it had no "authority to dictate acts of general character." *Id.* at 256a. In Honduras, that power resided only in the President. *Id.*

Mr. McNab filed an action to annul Resolution 030-95 in the Court of First Instance of Administrative Law in Honduras.[8] In May 2001, before judgment of conviction was entered in the district court, the Court of First Instance declared Resolution 030-95 invalid. Pet. App. 290a-301a. The court reasoned that Resolution 030-95 was "an administrative act[] of a general nature" (*i.e.*, a regulation). *Id.* at 296a. It held that Resolution 030-95 was not valid, because it had been issued by the Minister and the Director and not the President, who alone had jurisdiction to issue regulations. *Id.* at 295a-297a. Relying upon the power conferred by Article 32 of the Law of the Jurisdiction of Administrative Affairs, *id.* at 297a, the court announced that Resolution 030-95

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[8] Before the foreign law hearing, Mr. McNab sought from the Honduras Supreme Court a declaration that Resolution 030-95 was unconstitutional, which was denied for lack of jurisdiction. Pet. App. 56a-57a. Thereafter, Mr. McNab unsuccessfully sought a trial continuance to enable annulment proceedings to conclude in Honduras' courts. Tr. of Hr'g, Oct. 13, 2000, at 13-17.

was "null and void as a matter of law" and declared it "entirely voided ... for purposes of [its] annulment and future inapplicability," stating by way of explanation that "[t]his Resolution does not confer any right to claims." *Id.* at 298a. In October 2001 the Court of Appeals of Administrative Matters affirmed the judgment of the Court of the First Instance in all respects. *Id.* at 304a. No further appeal ensued, making that decision "final and firm." *Id.* at 322a. The Minister of Agriculture and Livestock accordingly declared that Resolution 030-95 "**never had the force of law**." *Id.* at 322a-323a (emphasis in original).

Before the court of appeals, the current Attorney General, Sergio Zavala Leiva, confirmed that Resolution 030-95 was "null and void *ab initio* and without legal force or effect." Pet. App. 265a; App. 18a, 20a. He stated that the "annulment and future inapplicability" language in the opinion of both administrative courts derived from "the laws of Honduras" (Pet. App. 266a-267a), specifically Article 32 of the Law of Jurisdiction over Action under Administrative Law. App. 18a-20a; *see also* Pet. App. 420a (Article 32). Courts that declare an act "null and void as a matter of law" under Article 32 necessarily determine the act is "deprived ... of its effects as from the moment it occurred." App. 19a. "Future inapplicability," as used in Article 32, refers only to a limit on damage claims that might otherwise be made against the government by persons against whom the invalid law had been applied in the past. Pet. App. 267a; App. 20a. Thus, Dr. Zavala testified, "Resolution 030-95 can no longer be applied in *any* Administrative or Judicial proceeding," and "[n]o individual ... can be sanctioned for failing to comply with [030-95], even when it is shown that the violation occurred before being declared null and void." Pet. App. at 267a. In short, Dr. Zavala testified that the resolution "never ha[s] had legal effect" (*id.*), and "was never the Law of Honduras" (*id.* at 268a).

b. *Acuerdo* 0008-93 (packaging). In January 1993 the President issued *Acuerdo* 0008-93 to enforce the Meat Law. The regulation aimed to protect health by imposing technological, hygienic and sanitary control over fishing products.

Pet. App. 330a. Article 49, governing the "icing and packaging" of "products," including lobster, *id.* at 353a & 331a-332a, stated: "The packaging must be made in boxes with the appropriate label, treated with paraffin." *Id.* at 354a.

Two years later, on January 13, 1995, the Congress expressly repealed the Meat Law *in toto*. Pet. App. 406a. In doing so, it noted that the existing zoosanitary laws required "modernization" and reconciliation with other standards. *Id.* at 405a. It directed the "Executive Power," acting through the Minister of Natural Resources, to "strengthen the phytozoosanitation" by issuing "rules of this Law" within 90 days. *Id.* at 406a. In December 1999, long after that 90-day window expired, the President issued new processing requirements in *Acuerdo* 1081-99. *Id.* at 29a. That same regulation recited that *Acuerdo* 0008-93 was repealed. *Id.*

Such express repeal of *Acuerdo* 0008-93 was unnecessary. The Congress has decreed that express repeal of a statute "leaves without legal effect" any regulations referring to the repealed law. Pet. App. 408a-409a (Decree No. 198-2001). The Attorney General opined that express repeal of the Meat Law in effect "repeal[ed] all of those regulations promulgated under this Decree, including *Acuerdo* 0008-93,"[9] and that "*Acuerdo* 0008-93 had no legal validity or force during the relevant period of time in this case." *Id.* at 269a; *see also* App. 21a. The Director General of SENASA, charged with enforcement of hygiene laws, agreed.[10]

c. Article 70(3) of Decree No. 154 (egg-bearing lobsters). Article 70(3) of the Fisheries Law authorized penalties for

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[9] The Attorney General explained that this "longstanding principle of law" was in effect before the Meat Law was repealed, and was "reiterated" by the Congress in interpretive Decree No. 198-2001, which explained what Article 43 of the Civil Code has always meant. Pet. App. 269a; App. 21a-22a & n.11 (discussing General Principles of Law).

[10] The Director General confirmed that *Acuerdo* 0008-093 was *not* enforced after January 13, 1995, in view of the Meat Law's repeal, and that the President mentioned 0008-93 in *Acuerdo* 1081-99, without having considered the effect of the Meat Law's repeal. App. 1a-2a, 5a.

13 different activities, including "destroy[ing] or harvest[ing] the eggs, or the offspring of fish, chelonians or other aquatic species for profit." Pet. App. 395a. According to the General Director of DIGEPESCA, Article 70(3) "only forbade the destruction or collection for profit of the spawn/eggs or young of fishes, chelonians or other aquatic species," (App. 8a)—*not*, as the indictment in this case alleged, "keeping" or "killing" the egg-laying species. Pet. App. 117a (¶10), 119a (¶15), 135a (¶94). The Attorney General has affirmed the Director's interpretation, reasoning that a broader prohibition of the harvest of egg-laying species would effectively penalize all fishing (in light of the many marine species for which pregnancy is not outwardly apparent), an absurdity that would be economically disastrous (*id.* at 270a; App. 22a). He has also opined that the "for profit" element in Article 70(3) requires the profits be derived from sale of eggs, not fish. App. 22a.

After Mr. McNab's trial concluded, the Congress amended Article 70(3). Pet. App. 411a. The amendment, *inter alia*, replaced the prior list of 13 proscribed activities with a list of 10 specific activities plus a catchall provision for "analogous" activities. *Id.* at 411a-412a. The amended list contains no prohibition whatsoever respecting the harvest or destruction of eggs of aquatic species, or any other analogous provision.[11]

4. Additional Diplomatic Attempts To Present Honduras' Official Position To The United States

On January 23, 2002, before the Eleventh Circuit's decision, the Honduran Embassy in the United States sent the U.S. State Department a diplomatic note. That note attached documents certifying the official position of the Minister of Agriculture and Livestock—that Mr. McNab had

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[11] Article 96 of the Honduran Constitution (Pet. App. 415a) guarantees retroactive effect in criminal matters of any change in law favoring the accused. The Attorney General has opined that the amendment of Article 70(3) has retroactive effect in the criminal proceedings brought against Mr. McNab in the United States. *Id.* at 270a.

violated none of the three foreign laws at issue. Pet. App. 326a. The Embassy further requested that the documents be "submitted as soon as possible to the Department of Justice for its consideration." *Id.*

ARGUMENT

I. THE COURT OF APPEALS SUBSTITUTED ITS OWN ERRONEOUS READING OF HONDURAN LAWS IN PLACE OF HONDURAS' OFFICIAL INTERPRETATIONS

The Eleventh Circuit attempted to answer four questions of Honduran law: (1) whether the Honduran courts' judgment that Resolution 030-95 was invalid applied to conduct preceding the judgment; (2) whether *Acuerdo* 0008-93 lacked effect as of the date the Meat Law was repealed; (3) whether Article 70(3) prohibited capture of egg-bearing species; and (4) whether amendment of Article 70(3) operated retroactively. The court's resolution of each question contradicts the official views of Honduras articulated by authorized institutions and representatives. In each case, the court incorrectly and improperly substituted its own interpretation of text provided in translation, affording the official views of Honduras no deference or weight.

First, the Eleventh Circuit held that Resolution 030-95's size restrictions were valid at the time of Mr. McNab's conduct, and that the Honduran court's opinion declaring 030-95 invalid applied only prospectively. Pet. App. 27a. It based that conclusion on an interpretation of the Honduran court's declaration that Resolution 030-95 was "entirely voided ... for purposes of annulment and future inapplicability: This Resolution does not confer any right to claims." *Id.* at 25a. The Eleventh Circuit pronounced this reference to "future inapplicability" a "clear[] state[ment] that Resolution 030-95 was annulled for prospective application only." *Id.* at 27a. But, as noted above, the Attorney General of Honduras had definitively advised the court of appeals to the contrary. *Id.* at 266a-268a. Moreover, this interpretation ignores the

separate language of the Honduran court's opinion, which states that the resolution was "entirely voided . . . for purposes of annulment" and "absolutely null and void."[12] It also disregards the statutory basis for the Honduran court's jurisdiction in Article 32, which provides that any act declared null and void "be treated as if it had never been carried out," (App. 19a), as well as Article 1596 of the Civil Code, which states that a declaration of "absolute nullity" restores parties to their position prior to the null and void act (*id.* at 19a n.9). The Eleventh Circuit also ignored the textual link between the phrase "future inapplicability" and "right to claims." The Attorney General's explanation—that in light of Article 32 the "future inapplicability" language functions to protect the Honduran government from damages claims based upon past enforcement—is the *only* one that gives meaning to each and every word in the Honduran court's opinion.

Second, the Eleventh Circuit erroneously held that *Acuerdo* 0008-93 continued to have force and effect after the Meat Law was repealed. It interpreted Articles 43 and 44 of the Honduran Civil Code to mean that a regulation survives repeal of its organic statute, so long as the preexisting regulation is not inconsistent with any portion of the repealing legislation itself. Pet. App. 31a. That reading, however, directly contradicts the Congress' interpretation of Article 43, and the Attorney's General's testimony that the Congress merely formalized a longstanding principle of law in its interpretation of Article 43.[13]

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[12] The Attorney General testified that "annulment" and "null and void," as used by the Court of First Instance, meant "void ab initio" and "officially nonexistent for *any* persons who could have been affected by it." Pet. App. 266a (emphasis added). A declaration that an act is "absolutely null and void" or "null and void as a matter of law" "gives the parties the right to be restored to the same Condition in which they were had the null and void act . . . not existed." App. 19a n.9.

[13] The Eleventh Circuit also implicitly rejected Dr. Zavala's unopposed testimony that Decree No. 198-2001, as an interpretive decree, was

The court of appeals cited statements from mid-level Honduran government employees like Secretary General Liliana Paz that *Acuerdo* 0008-93 was "valid" or continued to be enforced after the repeal of Decree No. 40 (Pet. App. 30a n.33),[14] notwithstanding the official and authoritative representation of Honduras that such officials had no authority to interpret any principle of Honduran law on its behalf. The court of appeals believed that the President's "repeal" of *Acuerdo* 0008-93 in 1999 could not be explained if the legislature had indeed previously repealed it in 1995. But the court ignored the testimony of the Director General of SENASA, who explained that the 1999 repeal was superfluous. Finally, the court below advanced a policy rationale that the Congress could not have intended its country to be without hygiene regulations from 1995 to 1999. But that justification disregarded Congress' 1995 statutory mandate that new rules be promulgated within 90 days of repeal of the Meat Law. The Eleventh Circuit elevated its own understanding of Honduras' Civil Code and policy judgments over the express decree of the Congress.

Third, the court of appeals affirmed the district court's finding that Article 70(3) prohibited the capture of egg-bearing species, and held that an amendment to 70(3) that post-dated Mr. McNab's conduct did not render the egg prohibition unenforceable against him. Both conclusions were erroneous. As to the scope of the egg provision, the court deemed that the "plain language" made capture of egg-bearing lobsters illegal, without even citing the testimony of the DIGEPESCA General Director and Attorney General to the contrary. Pet. App. 32a. And it inexplicably rejected the unequivocal declaration of the Attorney General that the

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effective as of the date of the decree it interpreted—a date before the lobster shipments in this case.

[14] These statements were unaccompanied by evidence that Honduras had taken *any* adverse enforcement action under *Acuerdo* 0008-93 after the Meat Law's repeal. Indeed, the General Director of SENASA testified that 0008-93 *was not* enforced after 1995. App. 1a, 5a.

Honduran Constitution would render the amendment of Article 70(3) retroactive "in criminal matters" if a violation had in fact occurred, which it had not.

The Eleventh Circuit has now established a unique, and uniquely disrespectful, approach toward review of foreign-law determinations that gives no consideration to civil law norms and rules of interpretation applied in the foreign country. It provided *no* deference to the special expertise of authorized Honduran officials regarding the interpretation of laws in the original Spanish and the unwritten legal norms in their country. App. 17a-18a. As other courts recognize, Pet. 15-22, deference to such officials is a requisite component of *de novo* review of foreign law determinations, and for good reason. Because legal systems are by nature inherently complex, and because foreign-law judgments must often be based on translations that fail to capture textual nuances recognizable only in the original language, the interpretative guidance of the foreign sovereign itself should be dismissed (if at all) only for the most compelling of reasons.

II. HONDURAS' OFFICIAL POSITION IN THIS LITIGATION HAS BEEN UNIFORM AND UNCHANGING

At several points, the court of appeals implied that it need not afford any special consideration to the official views of the Congress or the Attorney General because such views had "shift[ed]" or "changed" during this case (Pet. App. 20a, 22a, 24a). At other points, it suggested that the official position of Honduras is not uniform, because various "officials" offered "conflicting" views of Honduran law (*id.* at 26a), or had not "reached consensus" (*id.* at 28a). This was error. Both courts below simply misinterpreted Honduran law, and the court of appeals compounded that mistake by accusing Honduras of shifting positions when, in fact, Honduras had merely pointed out the district court's misinterpretation.

Honduras sought leave to participate as an amicus curiae only after the case was appealed, although Mr. McNab presented official Honduran positions to the district court through the testimony of Attorney General Tróchez. The positions articulated in that submissions by Mr. McNab was

in fact consistent with the official position offered by Honduras on appeal. The "original government position" constructed by the Eleventh Circuit consists of statements made by mid-level government bureaucrats who were unauthorized to offer legal opinions on behalf of Honduras and who, in several instances, offered such opinions before any final, official government position had even been formed.

The centerpiece of the lower courts' conclusion that all three laws were valid and enforceable was the "critical" testimony of Liliana Paz, Secretary General in the Ministry of Agriculture and Livestock. Pet. App. 56a. Ms. Paz was the only Honduran government employee who testified live.[15]

As Honduras informed the Eleventh Circuit, Ms. Paz had *no* authority to offer any legal opinions on behalf of the Republic. Regulations issued pursuant to the General Law of the Public Administration describe the position of Secretary General as an "agen[t] of communication" and a "certification official[]." *See* Pet. App. 286a. Ms. Paz's duties include, *inter alia*, to "see that the matters being processed are dispatched by the established deadlines," to "keep a record of the official correspondence," and to "notify . . . concerned parties of the decisions or resolutions." *Id.* Secretaries General, moreover, have no decision-making authority beyond the authority properly delegated to them *through a Delegation Acuerdo* by the head of the respective agency. *See* Pet. App. 263a. As explained by the Attorney General, a Secretary General "does not issue legal opinions *at any time* . . . . This would violate the Honduran legal structure."

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[15] The courts below repeatedly cited Ms. Paz's testimony to support their conclusions that each foreign law was valid (Pet. App. 54a, 62a, 63a, 64a, 30a n.33); that the annulment of Resolution 030-95 by the administrative courts applied only prospectively (*id.* at 27a n.29); that Honduras continued to enforce *Acuerdo* 0008-93 after 1995 (*id.* at 72a-73a, 30a n.33); and that the prohibition on harvest or destruction of eggs survived the amendment to Article 70(3) (*id.* at 76a & 33a (referring to "government's evidence" at Pet. App. 28a n. 32)).

Id.[16] Ms. Paz's testimony merely expressed her personal opinion and was not Honduras' official position.[17]

The Honduran Constitution provides: "The servants of the State only have those powers expressly conferred upon them by the law. Any act performed by them outside the Law is null and void . . . ." Pet. App. 280a. That is why, when Mr. McNab lodged a complaint with the National Human Rights Commissioner regarding Ms. Paz's testimony, the Commissioner recommended that the Minister of Agriculture and Livestock "disqualify as an error of law" her testimony. *Id.* at 313a. The Minister did so on November 15, 2001, certifying the "official" position of the Minister (*id.* at 316a): that Resolution 030-95 never had the force of law (*id.* at 317a); that *Acuerdo* 0008-93 was repealed in 1995 (*id.*); and that the amendment to Section 70(3) eliminating the egg provision retroactively removed any prohibition on the har-

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[16] Although the Eleventh Circuit characterized Ms. Paz as the "highest ranking legal official" in the Ministry of Agriculture and Livestock (Pet. App. 7a), such conclusion is entirely unsupported by evidence. It quoted a brief of the United States, whose record citations in turn quoted argument by the prosecutor. Those statements wildly exaggerate Ms. Paz's testimony, who characterized the extent of her "legal duties" as "helping the Minister in matters having to do with legal affairs." *Id.* at 160a. The Minister's affidavit quoted by the Eleventh Circuit as the source of her authority (*id.* at 22a n.25) does not constitute a Delegation *Acuerdo* such as would be necessary to permit her to offer legal opinions on behalf of Honduras.

[17] The Eleventh Circuit also relied, in part, on statements from Jose Bernardo Torres Umanzor, a legal advisor in the Ministry of Agriculture and Livestock, and Juan Hernandez Espinoza, a criminal prosecutor. But as with Ms. Paz, neither occupied a position that authorized him to provide official legal opinions on behalf of Honduras. Indeed, prosecutor Hernandez went so far afield as to offer legal opinions about matters completely outside his job function—*i.e.*, the meaning and effect of a ruling issued by an administrative court. Pet. App. 264a n.10. Likewise, Mr. Torres lacked authority to provide legal opinions outside the Ministry of Agriculture and Livestock. *Id.* at 263a (opinions from advisory organs are "solely for internal use"). In any event, his opinion was superseded by his supervisor, the Minister, whose final, definitive views contradicted his statement. *See* Pet. App. 315a-318a; App. 1a-2a, 5a.

vest or destruction of eggs. *Id.* at 318a. This administrative act by the Minister represents the official position of Honduras, and established the agency's legal position to be applied in all cases henceforth. App. 11a-12a & 15a-16a.

To the extent that any "inconsistency" was produced by the refinement of the government's position during the pendency of non-final legislative, judicial and administrative proceedings, such "inconsistency" was no different than what occurs in the course of the evolution of United States law. It is not unusual in this country for government employees charged with implementing a law to support the validity of a statute or regulation or to opine on the meaning or scope of a judicial ruling—only to be told later by a court of last resort or a higher-ranking legal authority that such law is invalid or such interpretation is wrong. When clarification of United States law benefits a convicted defendant whose direct appeal is not yet final, it must be applied in his favor. *See* Pet. 28-29. It is axiomatic that a Lacey Act conviction based on a state law validated by an intermediate state court decision would be vacated if that state's Supreme Court overruled the lower court's decision, even after the Lacey Act trial.

On direct appeal from conviction of the parallel Lacey Act provision that prohibits importation "in violation of any law . . . of any State," 16 U.S.C. § 3372(a)(2)(A), this Court has examined the underlying validity of a predicate offense. In *Maine* v. *Taylor*, 477 U.S. 131, 133 (1986), the defendant pleaded guilty to importing fish in violation of a Maine law. After the First Circuit overturned his conviction on the ground that the Maine law unconstitutionally burdened interstate commerce, this Court granted certiorari and reiterated that the Lacey Act provides for "federal enforcement of *valid* state and foreign wildlife laws." *Id.* at 139 (emphasis added). The Court ultimately found the state law constitutional (*id.* at 151), crediting the "legitimate justifications" for the law offered by Maine, which intervened to support its validity. *Id.* at 149. It criticized the First Circuit for suggesting that the State's justifications were "*post hoc* rationalization[s]." *Id.* The case presented here is no different—

the validity of the predicate offense should be examined in view of the official position of the government that promulgated the laws.

By applying a principle of "finality" that terminates a court's ability to recognize natural development of foreign law after a jury verdict (Pet. App. 22a-23a), the Eleventh Circuit interpreted the Lacey Act in a manner that treats defendants accused of domestic predicate offenses more favorably than those accused of foreign offenses. The Lacey Act—enacted to help *strengthen* a foreign country's laws[18]—ought not be used, as here, to subvert the evolution of a foreign sovereign's regulatory law.

III. THE STANDARD OF REVIEW ANNOUNCED BELOW VIOLATES PRINCIPLES OF COMITY AND IMPAIRS THE UNITED STATES' RELATIONSHIP WITH HONDURAS

Honduras asks that its legal system be treated with the respect that United States courts afford the legal systems of other sovereign nations, including, for example, Indonesia, Mexico, Brazil, China, France, Tonga and Cuba.[19] The Eleventh Circuit majority barely disguised its contempt for the system of laws in foreign countries when it stated that recognition of developments in a government's laws will enable wealthy criminals successfully to "lobby[] and prevail[] upon [the] country's officials." Pet. App. 24a. Such concerns find

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[18] *See* S. Rep. No. 97-123, at 4 (1981), *reprinted in* 1981 U.S.S.C.A.N. 1748, 1749 ("[The Lacey Act] would not constitute a broadening of Federal authority under the Act, but merely would allow the Federal Government to provide more adequate support for the full range of State, foreign and Federal laws that protect wildlife.").

[19] *See Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), *cert. denied*, 123 S. Ct. 2256 (2003); *Access Telecom, Inc.* v. *MCI Telecom. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999); *Riggs Nat'l Corp.* v. *Comm'r*, 163 F.3d 1363 (D.C. Cir. 1999); *Richmark Corp.* v. *Timber Fallling Consultants*, 959 F.2d 1468 (9th Cir. 1992); *In re Oil Spill by Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992) (*per curiam*); *Kaho* v. *Ilchert*, 765 F.2d 877 (9th Cir. 1985); *United States* v. *Pillsbury Flour Mills Co.*, 96 F.2d 854, 859-860 (C.C.P.A. 1938).

no basis in the record of this case. And they cannot justify a standard of review that severely undermines principles of comity and deference typically applied when American courts tread into unfamiliar waters of foreign law.

Moreover, the Eleventh Circuit's standard for considering (or not considering) the official views of foreign governments in the Lacey Act context, if left uncorrected, will dramatically harm the trading relationship between Honduras and the United States, especially in the marine fisheries industry that is so critical to Honduras' economy. If Honduras' complex administrative code is open to reinterpretation by United States prosecutors and courts, Honduran citizens importing goods to this country can no longer be secure in statements by Honduran courts or the Honduran Congress that they have complied with ambiguous Honduran laws and regulations. That a Honduran citizen has been convicted and sentenced to eight years in prison for conduct that was not properly deemed even an administrative violation, much less a crime, in Honduras can only result in distrust that will produce less cooperation and less trade overall.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2003

APPENDIX

APPENDIX

SAG SECRETARIAT OF AGRICULTURE AND LIVESTOCK

By producing more, we will preserve peace

NATIONAL AGRICULTURAL AND LIVESTOCK HEALTH SERVICE (**SENASA**)

STATEMENT FOR THE RECORD

The Undersigned Director General of the National Agricultural and Livestock Health Service (SENASA) hereby STATES FOR THE RECORD:

1. That the Draft Regulations for the Animal Health Inspection and Certification Regulations of Fisheries and Aquatic Products in Decision ["Acuerdo"] 1081-99 was formulated by **Secretary of State in the Offices of Agriculture and Livestock through this General Directorate of the National Agricultural and Livestock Health Service (SENASA)** pursuant to Article 36, Number 5, of the General Public Administration Law, which sets forth that it is an attribution and power of the Secretary of State to formulate, with regard to matters over which he has jurisdiction, the Draft Regulations of the President of the Republic.

2. Decision ["Acuerdo"] 0008-93, issued pursuant to the Meat Industrialization Law (Executive Decree No. 40 of May 16, 1973), was repealed and rendered without any legal value or effects as of January 13, 1995, when the Plant and Animal Health Law (Decree 157-94) went into effect, which repeals in Article 42 thereof the Meat Industrialization Law.

The repeal of Decision ["Acuerdo"] 0008-93, which appears in Article 124 of Decision ["Acuerdo"] No. 1081-99

was not necessary, inasmuch as it had already been repealed since 1995.

3. The foregoing occurred, due to the fact that, when the Draft Regulations in question were drawn up, the fact that the Meat Industrialization Law had been expressly repealed previously was not considered.

In witness whereof, for the record, I sign these presents in the city of Tegucigalpa, M.D.C., on the eleventh day of the month of January of the year two thousand two.

[illegible signature]

DR. FRANCISCO RODAS CH.

Director General of SENASA

[Rubber stamp w/coat-of-arms in the center reading: "SECRETARIAT OF STATE IN THE OFFICE OF AGRICULTURE AND LIVESTOCK, GENERAL DIRECTORATE OF SENASA, TEGUCIGALPA, M.D.C., HONDURAS".]

cc: File

Main Offices: Boulevard Miraflores, Avenida de la FAO,
Tegucigalpa, M.D.C., Honduras, C.A.
Telephones: 232-9089,232-7747 - Fax: 231-0786,
Post Office No. 309

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as uch by the U.S. Federal Court System, and that I have translated the attached document from Spanish into English on January 15, 2002, to the best of my ability.

Signed: /s/ Paul R. Sadur
Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

WITNESS my hand and official seal, the 15th day of January, A.D. 2002.

/s/ Frances R. Everidge
Notary Public
State of Florida at Large

_ Personally known by me.
X Produced the following identification:
FL Drivers License

Frances R. Everidge
Notary Public, State of Florida
My. comm. expires Dec. 26, 2003.
Comm. No. CC 897604

SAG SECRETARIAT OF AGRICULTURE AND LIVESTOCK

By producing more, we will preserve peace

NATIONAL AGRICULTURAL AND LIVESTOCK HEALTH SERVICE (**SENASA**)

STATEMENT FOR THE RECORD

The Undersigned Director General of the National Agricultural and Livestock Health Service (SENASA) hereby **STATES FOR THE RECORD**:

1. That the National Agricultural and Livestock Health Service (SENASA) was created as a General Directorate, just as stipulated in Article 3 of the Plant and Animal Health Law, Decree No. 157-94. The Secretariat of Agriculture and Livestock through SENASA shall be responsible for enforcing compliance with the provisions of the Plant and Animal (Health] Law and its Regulations relative to Animal and Plant Health.

2. That the Industrial Inspection and Health and Hygiene Regulations of Fisheries Products (Decision ["Acuerdo"] 0008-93) was not enforced by SF-NASA after January 13, 1995, in view of the fact that the Meat Industrialization Law, on which said Decision is based, was repealed on that day by the Plant and Animal Health Law.

In witness whereof, for the record, I sign these presents in the city of Tegucigalpa, Municipality of the Central District, on the twenty-fifth day of the month of January of the year two thousand two.

[illegible signature]

DR. FRANCISCO RODAS CH.

Director General of SENASA

[Rubber stamp w/coat-of-arms in the center reading: "SECRETARIAT OF STATE IN THE OFFICE OF AGRICULTURE AND LIVESTOCK. GENERAL DIRECTORATE OF SENASA. TEGUCIGALPA, M.D.C., HONDURAS".]

cc: File

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TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached document from Spanish into English on February 1, 2002, to the best of my ability.

Signed: /s/ Paul R. Sadur
Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

[SAG letterhead]
SECRETARIA DE AGRICULTURA Y GANADERIA
DIRECCIÓN GENERAL DE PESCA Y ACUICULTURA

DECLARACIÓN

LA DIRECCIÓN GENERAL DE PESCA Y ACUICULTURA. Tegucigalpa, Municipio del Distrito Central, cuatro de marzo del dos mil dos.- En cumplimiento del auto emitido por la Secretaria General de la Secretaria de Estado en los Despachos de Agricultura y Ganaderia, relacionado con la solicitud de Declaración, presentada por la Licenciada **MARIA LETIZIA SUAZO DE GUILLEN** en su condición de apoderada legal del señior **DAVID HENSON MCNAB**; esta Dirección General de Pesca responde de la forma siguiente:

1.- En relación a la interrogante numero (1) Es la Secretaria de Estado en los Despachos de Agricultura y Ganaderia a través de la DIRECCION GENERAL DE PESCA Y ACUICULTURA (DIGEPESCA) la autoridad encargada de la aplicación de las Leyes Pesqueras Hondureñas.

2.- En relación a la interrogante numero (2) El articulo 70 numeral 3 de la Ley de Pesca contenido en el Decreto No 154 de fecha 9 de junio de 1959; **SOLAMENTE PROHIBÍA LA DESTRUCCIÓN O RECOLECCIÓN CON FINES DE LUCRO DE LOS HUEVOS 0 DE LAS CRIAS DE LOS PECES, QUELONIOS U OTRAS ESPECIES ACUATICAS, no asi LA DESTRUCCIÓN O RECOLECCIÓN DE LAS ESPECIES OVADAS.**

3.- En relación a la interrogante numero (3), Efectivamente El articulo 70 numeral 3 do la Ley de Pesca contenido en el Decreto No 154 de fecha 9 de junio de 1959, este dejo de aplicarse una vez que entro en vigencia las reformas del articulo 70 mediante Decreto 245 -2000 del veintidós de diciembre del dos mil y publicado el cinco febrero del dos mil uno.

/s/
GABRIELA PINEDA DE ARIAS
DIRECTORA GENERAL

[New Page]

SAG SECRETARIAT OF AGRICULTURE AND LIVESTOCK **DIGESPESCA**
By producing more, we will preserve peace

GENERAL DIRECTORATE OF FISHERIES AND AQUACULTURE

STATEMENT

THE GENERAL DIRECTORATE OF FISHERIES AND AQUACULTURE, Tegucigalpa, Municipality of the Central District, fourth day of the month of March of the year two thousand two.

Pursuant to the decision issued by the Secretary General of the Secretariat of State in the Offices of Agriculture and Livestock, related to the request for a Statement, submitted by **MARÍA LETIZIA SUAZO DE GUILLÉN**, Esq., as legal representative of Mr. **DAVID HENSON McNAB**; this General Fisheries Directorate responds as follows:

1. With regard to question number (1), the Secretariat of State in the Offices of Agriculture and Livestock through the GENERAL DIRECTORATE OF FISHERIES AND AQUACULTURE (DIGEPESCA), is the authority responsible for the enforcement of Honduran Fisheries Laws.

2. With regard to question number (2), Article 70, Item 3, of the Fisheries Law contained in Decree No. 154, dated June 9, 1959, **ONLY FORBADE THE DESTRUCTION OR COLLECTION FOR PROFIT OF**

THE SPAWN/EGGS OR YOUNG OF FISHES, CHELONIANS OR OTHER AQUATIC SPECIES, BUT NOT THE DESTRUCTION OR COLLECTION OF THE EGG-LAYING SPECIES.

3. With regard to question number (3), indeed Article 70, Item 3, of the Fisheries Law contained in Decree No. 154 dated June 9, 1959, ceased to be enforced once the amendments of Article 70 went into effect by means of Decree 245-2000 of the twenty-second of December of the year two thousand, as published on the fifth day of February of the year two thousand one.

[Seal: "SECRETARIAT OF AGRICULTURE AND LIVESTOCK. GENERAL DIRECTORATE OF FISHERIES AND LIVESTOCK. DIGEPESCA. HONDURAS. CENTRAL AMERICA".]

[illegible signature]

GABRIELA PINEDA DE ARIAS

GENERAL DIRECTOR

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San Pedro Sula; [illegible no.]; Phone: [illegible no.]
La Caiba [illegible no.]; Trujillo 444-4840;
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Fisheries Investigation Center El Corso,
Comayagua 772-0408
Aquatic Investigation Center, San Lorenzo [illegible no.];
Puerto Lempira [illegible no.]

TRANSLATOR'S CERTIFICATION

I, THE UNDERSIGNED TRANSLATOR, HEREBY CERTIFY that I am a Spanish-English translator accredited as such by the American Translators Association and a Spanish-English, English-Spanish interpreter certified as such by the U.S. Federal Court System, and that I have translated the attached document from Spanish into English on March 5, 2002, to the best of my ability.

Signed: /s/ Paul R. Sadur
Paul R. Sadur
ATA Accredited Translator
Federally Certified Interpreter

Subscribed and sworn to before me,
/s/ Susan L. Kingston
Susan L. Kingston
Commission # DD086863
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SUPPLEMENTARY STATEMENT OF SERGIO ZAVALA LEIVA, ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS

I am the Attorney General of the Republic of Honduras and as such, its legal representative[1] by virtue of Article 228 of the Constitution of the Republic. In that capacity, I appear before this Honorable Supreme Court of Justice to supplement the statement that I submitted in this case to the U.S. Court of Appeals for the Eleventh Circuit.

We understand that the U.S. Courts have had difficulty in determining the law of Honduras applicable to this case. Our legal system is different from the U.S. system in that it is based on written laws, while the U.S. system is based on judicial decisions, and, hence, our system is unknown and very different.

In the interest of Justice, I must now complement my previous statement to help this Court correctly interpret and apply the laws of our country.

I. The State of Honduras has at no time changed its official position regarding its laws.

A) As we already mentioned, the Constitution of the Republic stipulates that the State's Legal Representative is the Attorney General of the Republic, and as such, he is authorized to declare the position of the State. In our legal system, there are also so-called "Acts of the Administration's agencies" or Administrative Acts that, according to legal doctrine,

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[1] I was appointed Attorney General of the Republic of Honduras through Decree No. 3-2002, issued by the National Congress on January 26, 2002. I have the authority to issue statements of an illustrative or doctrinal nature in which the State of Honduras informs its official position under the Law of the Office of the Attorney General of the Republic.

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are considered to be legal acts of the administrative function that constitute the intention, judgment, knowledge or desire of the agency that issues them, and as such, legal effects are derived from them.

B) The Law says that: "acts of agencies of the public Administration will be in the form of Decrees, Decisions, Resolutions or Orders" (Article 116 of the General Law of the Public Administration), and the following are null and void "a) Those issued by agencies having absolutely no jurisdiction;... [and] c) Those issued by dispensing totally and absolutely with the established procedure" (Article 34 of the Law of Administrative Procedure). Consequently, any act created in violation of those legal regulations has neither value nor legal effect[2].

C) The Eleventh Circuit based its interpretation of Honduran laws on the testimony of officials that provided cooperation that was neither official nor binding to the U.S. officials.

D) Honduras has been involved in this case solely through its Minister of Agriculture and Livestock through a Resolution of November 15, 2001, as well as through this Office of the Attorney General of the Republic and the Embassy of Honduras in the United States, acting as *Amicus Curiae* before the Eleventh Circuit. The Government of Honduras has not changed its official position, but, instead, refers to the legal aspects contained in this document.

II. Interpretation of the Law in the Honduran legal system.

A) In Honduras, there are three types of interpretations of the laws:

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[2] For more details, see the Statement presented before the Eleventh Circuit.

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1. **Authentic interpretation:** This interpretation emanates from the lawmaker when he explains the meaning of his own laws.
2. **Judicial interpretation:** This interpretation is imposed by the courts of justice when applying laws in specific cases.
3. **Doctrinal interpretation:** This interpretation is the one that jurists or experts in jurisprudence make when giving their personal opinions, and it receives its strength from the experience and wisdom of its authors.

B) In our legal system, the judicial interpretation is applicable only to a case in which the judgment is handed down and does not have general effects like judicial precedent ("stare decisis"), as is the case in the U.S. system of jurisprudence. For such reason and as an answer to the need for a general interpretation of the Law, our legislation contemplates that "the lawmaker is called upon only to explain or interpret the law in a way generally compulsory (Article 3 of the Civil Code)[3].

C) When the National Congress interprets a law, it is not amending it. To amend is another of the powers of the National Congress. The Constitution of the Republic stipulates in its Article 205, paragraph No. 1, that the National Congress has the power "to create, decree, ***interpret***, ***amend*** and repeal laws" (the emphasis is added). When using different terms for "interpret" and "amend" the laws, the National Constituent Assembly made the conscious decision to differentiate between the two terms. Therefore, the term "interpret" does not include "amend," and an interpretation of the law is not an amendment.

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[3] This precept is not unique to Honduran legislation, but, instead, it is similar in almost all civil legal systems based on Roman law and has its origin in the Justinian Code that includes the principle that "the law must be interpreted by the one who makes it."

D) In the vernacular, the word "interpret" means "to explain or state the meaning of a thing, mainly texts that lack clarity" (Dictionary of the Spanish Language, Spanish Royal Academy [Diccionario de la Lengua Española, Real Academia Española], Twentieth Edition). The Dictionary of Customary Law [Diccionario de Derecho Usual] defines the word "interpretation" as the "statement, explanation or clarification of the meaning of a thing or of an incomplete, nebulous or questionable text", and it defines explicitly the phrase "authentic interpretation" as "the clarification that the lawmaker himself makes of a law issued by it" (Dictionary of Customary Law [Diccionario de Derecho Usual], Guillermo Cabanellas, Sixth Edition). The word "interpretation" in no way includes *the change* of the meaning of what is interpreted.

E) If, when interpreting a law, the National Congress is only explaining the meaning thereof, logically, such explanation does not give rise to any problem of retroactivity, because the explanation gives the sense that the Law has always had. Consequently, such interpretation requires that it be incorporated at the time the interpreted law is applied in any pending case.

F) It is important to differentiate between a doctrinal interpretation and the lawmaker's authentic interpretation. The former is the opinion of jurists who can illustrate regarding a specific aspect of the law, what we call "experts", just as several persons for both parties have appeared, both private individuals as well as government employees. The lawmaker's authentic interpretation is the Law itself, an, therefore, it cannot be impugned. In this latter case, the courts of justice must not debate whether they are convinced with the

interpretation. They must simply accept it without debate[4].

G) In our legal system, the lawmaker's authentic interpretation has effects that are similar to those that the interpretation of a law by the Supreme Court has in the United States. Both are the maximum authority to interpret the laws in our countries.

H) If any person feels he is harmed by an interpretative Law and feels that the National Congress has acted incorrectly in making such interpretation, he can file an Appeal of Unconstitutionality before the Supreme Court of Justice.

III. Resolutions issued by a Minister are administrative acts that are similar to judicial rulings and have similar legal effects.

A) "The Resolution will put an end to the procedure, and all matters put forth by interested parties will be decided in its operative part, ..." (Article 83 of the Law of Administrative Procedure). The Resolution is the act through which the Administration states its position with respect to matters requested by interested parties when a procedure begins through a formal petition. It is therefore the act through which the State declares its intention or decision with respect to a given situation posed by an interested party.

B) The Resolution of the Minister of Agriculture and Livestock issued on November 15, 2001, concluding the administrative procedure begun by the National Human Rights Commissioner, has legal efficacy under the laws of Honduras, establishes the decision of the State with respect to the matter raised by the Commissioner in his

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[4] The only case in which a Court of Justice can fail to incorporate a legislative interpretation to the interpreted law is one in which there is a determination of unconstitutionality declared by the Supreme Court of Justice.

report and establishes the correct standard of conduct within the Ministry of Agriculture and Livestock. According to Article 8 of the General Law of Public Administration, agencies of the Public Administration may not violate the provisions issued by a higher-level agency, which must therefore be obeyed by all the officials of said Ministry.

C) In spite of the fact that it is an official act of the Government of Honduras and is equivalent to a court judgment, this administrative resolution has been completely ignored by the Court of Appeals.

D) It is important to emphasize the difference between the Resolution of the Minister of Agriculture and Livestock of November 15, 2001, concluding the procedure begun by the National Human Rights Commissioner, and Resolution 030-95, which serves as a basis for the accusation. The Resolution of November 15 is the act through which the administration formally decides the matters presented in a petition after following the procedure required by Law. On the other hand, Resolution 030-95 establishes measures of a regulatory nature that are vested in the President of the Republic[5]. The courts of Jurisdiction over Action under Administrative Law (Contencioso-Administrativo) treated Resolution 030-95 as a Regulation and declared its nullity based on Article 34 of the Law of Administrative Procedure because it was issued by an agency absolutely lacking jurisdiction[6] and because it dispensed with the required procedure.

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[5] The exception occurs when the law expressly vests this power of regulate in a different agency.

[6] The Constitution of the Republic stipulates that the President of the Republic is the one responsible for issuing regulations of a general nature. For more details, see the First Statement of this Office of the Attorney General presented before the Court of Appeals of the Eleventh Circuit.

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E) If any person that is considered affected feels that the Minister of Agriculture and Livestock has acted incorrectly in issuing its Resolution of November 15, it can resort to the Courts with Jurisdiction over Action under Administrative Law to sue to have the act declared illegal and be annulled. As long as this does not occur, this act of the administration is legitimate and has legal efficacy.

IV. When there are doubts with respect to the interpretation of a specific Law, "the obscure or contradictory passages will be interpreted in such a way as to be most in agreement with the general spirit of the legislation and natural equity" (Article 20 of the Civil Code).

A) In our legal system, there are general principles of law that are commonly known and used. Such principles, derived generally from Roman law, because they are not codified, can be contradictory for another different Legal System.

B) Laws are interpreted using the meaning of the words used by the Lawmaker, the context of the law itself, the general principles of law, the lawmaker's intention and natural equity. It must not be assumed that the lawmaker issues Laws that are absurd or that harm the country's interest.

C) The law can be translated from Spanish to English in different ways that can suggest different meanings. Therefore, it is important that the U.S. Courts must not give a literal interpretation to the terms used in the legal translations of foreign materials and that such courts recognize that foreign Governments (whose laws such courts must interpret) have the expert criterion that allows putting such translations in the foreign legal context and thus giving the translated laws the interpretation most in accordance with the natural

lawmaker's intention and with the internal consistency of the foreign legal system.

V. The disputed Honduran Laws and Regulations in the Case:

A) Resolution 030-95

As mentioned above, Resolution 030-95 was declared Null and Void by Operation of the Law (Nula de Pleno Derecho), *ab initio* or *ex tunc*, by the Administrative Courts for Action under Administrative Law because they were issued in violation of the laws of our country, "infringing the legal system at the time it was issued."

In view of the fact that the impugned resolutions, including Resolution 030-95, were considered final, the direct action of challenge could only be filed on the basis stipulated in Article 32 of the Law of Jurisdiction over Action under Administrative Law. In such sense, when the Courts for Action under Administrative Law declared the nullity of those acts, they necessarily determined that the Resolutions were Null and Void by Operation of the Law or Absolutely Null and Void although they were effective before they were declared null and void by the courts having competent jurisdiction.

To better understand the Absolute Nullity of Resolution 030-95, is important to understand the meaning of ***Nullity by Operation of the Law*** also known as ***Absolute Nullity.***

Nullity by Operation of the Law, or ***Absolute Nullity***, is the maximum degree of invalidity. The cases of Absolute Nullity in administrative law are more restricted than in common law and are limited to those expressly mentioned in administrative laws.[7] Nullity by Operation of the Law has the following features:

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[7] In Honduran administrative legislation, "without detriment to what is established in special laws, " the cases of absolute nullity are listed in Article 34 of the Law of Administrative Procedure (Decree No. 152-87 of September 28, 1987), and, among them, we mention "a) Those issued by

1. **There is no time limit to assert the violation**: Nullity can be claimed at any time, even when the act is final. This is expressly recognized in the Law of Jurisdiction over Action under Administrative Law, in its Article 32 when it "admits the action under Administrative Law against final acts... when they are null and void by operation of the law and are causing their effects."
2. **The defect cannot be cured**: Our administrative legislation establishes a difference between acts that are null and void and acts that can be annulled.[8] The defects of an act that can be annulled can be cured, whether through the simple passage of time or through other means, while defects of an act that is Null and Void by Operation of the Law cannot. For this reason, they must be declared null and void.
3. **The statement of nullity has *ex tunc* or *ab initio* efficacy**: The declaration of Absolute Nullity of an act deprives the act of its effects as from the moment it occurred. This is based on the General Principal of Law that requires that a null and void act be treated as if it had never been carried out.[9]

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agencies having absolutely no jurisdiction" and "c) Those issued by dispensing totally and absolutely with the established procedure."

[8] Articles 34, 35, 36 and 37 of the Law of Administrative Procedure, among others.

[9] The Civil Code of Honduras stipulates that there must be "proper harmony and consistency" among the laws (Art. 19), for which reason Article 1596 of the Code in question strengthens even more the application of this principle when stipulating that "Absolute nullity. . . declared by a final judgment gives the parties the right to be restored to the same Condition in which they were had the null and void act. . . not existed".

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Nullity by Operation of the Law of an administrative act is not automatic. A declaration by the bodies having jurisdiction, which in our country are the Courts for Action under Administrative Law, is necessary for it to be effective. Once the Nullity is declared, its consequences are the same as in common Law.

Having explained the features of ***Nullity by Operation of the Law*** or ***Absolute Nullity***, we analyze the relationship of the former with Article 32 of the Law of Jurisdiction over Action under Administrative Law.

Article 32 stipulates that "action will be admitted . . . against final acts . . . when they are ***null and void by operation of the law*** and are effective" (the emphasis has been added). Because this declaration of Nullity by Operation of the Law is *ab initio* or *ex tunc*, the State would run the risk of being sued for damages resulting from the application of impugned acts before they were declared null and void.

Foreseeing this situation, said Article stipulates that "action under Administrative Law will be admitted ... ***but only for purposes of its annulment and future inapplicability***" (the emphasis has been added), the latter being included for the government's protection.[10] This last part does not qualify or alter the *ab initio* effect of the declaration of nullity, nor does it at any time validate an act that has been declared ***Null and Void by Operation of the Law*** by the judicial authority having jurisdiction. As I said in my statement before the Eleventh Circuit, the purpose of the final part of the Article in question is "to protect [the State] from damages that could be caused by application of an act that is null by operation of the law."

There is no question that, according to the laws of Honduras, Resolution 030-95 was declared Null and Void by Operation of the Law, *ab-initio* or *ex tunc*, by the Courts for Action

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[10] If the declaration of Nullity as a Matter of Law were not *ab initio* or *ex tunc*, the inclusion of this phrase in the related Article 32 would be totally unnecessary.

under Administrative Law. Because it was declared Null and Void, Resolution 030-95 is treated as if it had never existed and it does not continue to be applied in any pending case, including criminal cases like this case.

B) Decision No. 0008-93

Decision 0008-93, promulgated to implement the Law of Industrialization of Meat (Decree Law number 40) has not been legally valid since 1995, when the Law based on which the Decision was issued was repealed.

Historically and Legally, a Regulation ceases to have validity when the Law that authorized it is repealed. This principle is based on the General Principles of Law accepted in Honduras.[11]

Furthermore, through Decree No. 198-2001, the National Congress incorporated this preexisting principle to the legal body of Article 43 of the Civil Code, explaining that "the express repeal ... of a law, renders the regulation issued to develop the repealed Law ... without value or legal effects."

The Office of the Attorney General of the Republic agrees with the great Honduran jurists[12] who issued statements on the matter in this case, saying that another General

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[11] The General Principle of Law in this sense was summarized by the National Human Rights Commissioner, Dr. Leo Valladares, in his Special Report as "the old maxim that the accessory follows the fate of the main thing". This principle has its origin in the precept of Roman Law that says: "*when the main thing does not subsist, the accessory thing cannot subsist.*" The "law" being the main thing and the "regulation" being the accessory, the regulation follows the fate of the law, i.e., when the law is repealed, so, too, is the regulation repealed.

[12] Attorney José Oswaldo Ramos Soto, former Chief Justice of the Supreme Court of Justice and former Dean and Constitutional Professor of Law of the School of Law of the National Autonomous University of Honduras, Attorney Nicolás Cruz Torres, former Magistrate of the Supreme Court of Justice, and Attorney Roberto Zacapa, author of several literary works on the Law in Honduras, are recognized and very prestigious jurists in Honduras and their legal interpretations enjoy a great deal of respect.

Principle of Law is that "the effects of the interpretative law are retroactive to the date on which the interpreted law went into effect." In other words, the interpretation of a law does not alter its sense, but simply clarifies the meaning that the interpreted law has always had since the moment it was born[13]. It should be noted that the Interpretative Decree is obligatory because it is a Law.

C) Article 70 (3) of the Law on Fishing

Article 70(3) of Decree No. 139 of May 19, 1959[14] has text that makes it difficult to interpret, even for the Honduran authorities themselves. This provision says verbatim: "Article 70- The following infractions will be penalized with three hundred Lempiras or three hundred days of incarceration: . . . (3) Those who destroy or harvest, the eggs or the offspring of fish, chelonians or other aquatic species for profit."

This Office of the Attorney General of the Republic feels that Article 70(3) only prohibited the destruction or collection of the eggs or offspring of fish, chelonians or other aquatic species but not the destruction or collection of egg-bearing (ovadas) species. Article 70(3) requires that there be direct profit from the eggs, which does not occur with the eggs of the lobsters because they have no commercial value.

CONCLUSION

For the above reasons, with the respect that that Honorable Supreme Court of Justice deserves, we request that it accept as correct the interpretations presented by the State of Honduras, as explained.

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[13] See part II of this statement referring to "The interpretation of the Law in the Honduran legal system, pp. 2, 3 and 4).

[14] Article 70 was replaced with new text that is found in Decree 245-2000. This new Decree does not include the prohibition contained in paragraph 3 of the original Article 70, which, according to our Constitution must be applied retroactively for the benefit of the defendant.

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Under penalty of perjury, I state that the information contained herein is true and correct.

Each of its pages is initialed and stamped, in the city of:

Tegucigalpa, Capital District Municipality,
December 23, 2003

SERGIO ZAVALA LEIVA
ATTORNEY GENERAL
OF THE REPUBLIC OF HONDURAS

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SECRETARIAT OF FOREIGN RELATIONS

No. 27870
The undersigned Secretary General of the Secretariat of State in the Office of Foreign Relations, duly authorized CERTIFIES: that the above signature that says SERGIO ZAVALA LEIVA is authentic.

Affixed in his capacity of: ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS

TEGUCIGALPA, CAPITAL DISTRICT
MUNICIPALITY, DECEMBER 24, 2003

JOSE R. LAGOS VALERIANO
IN CHARGE OF AUTHENTICATIONS

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This to certify that the translation of the attached document, **Ref.: SUPPLEMENTARY STATEMENT OF SERGIO ZAVALA LEIVA, ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS,** was performed by a professional translator and is to the best of our knowledge and ability, a true and accurate translation of the original text delivered to Language Innovations, LLC by our client, **Wilmer, Cutler & Pickering.** The original document was translated from **Spanish** into **English** and at completion delivered to the client on **December 29, 2003.**

I hereby declare that all statements made herein are of my own knowledge and are true and that all statements made based on information or belief are believed to be true.

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Date: December 29, 2003

Signature: /s/_____
Brian Friedman, Director
Language Innovations, LLC

Subscribed and sworn before me this 29th day of December 2003, at Washington, DC.

/s/_____

Notary Public
My Commission expires: _____
James M. Reed
Notary Public District of Columbia
My Commission Expires: June 30, 2007

DECLARACIÓN SUPLEMENTARIA DE SERGIO ZAVALA LEIVA, PROCURADOR GENERAL DE LA REPUBLICA DE HONDURAS

Soy el Procurador General de la Republica de Honduras y como tal, su representante legal[1] por virtud del Art. 228 de la Constitución de la Republica. En este carácter comparezco ante esta Honorable Corte Suprema de Justicia, para suplementar la declaración que presenté en este caso a la Corte de Apelaciones de los Estados Unidos del Onceavo Circuito.

Comprendemos que las Cortes de los Estados Unidos han tenido dificultad en determinar la ley de Honduras aplicable a este caso. Nuestro sistema legal se fundamenta en leyes escritas lo que lo diferencia del sistema estadounidense que se basa en decisiones judiciales, de tal manera que ambos sistemas son diferentes entre si.

En el interés de la Justicia, se me hace necesario ahora complementar mi declaración anterior para coadyuvar con esta Honorable Corte a interpretar y aplicar correctamente las leyes de nuestro país.

VI. El Estado de Honduras en ningún momento ha cambiado su posición oficial respecto a sus leyes.

A) La Constitución de la República, como ya lo mencionamos, establece que el Representante Legal del Estado es el Procurador General de la República, y como tal, autorizado para expresar la posición del Estado. En nuestro sistema legal, también existen los denominados "Actos de los órganos de la

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[1] Recibo mi condición de Procurador General de la Republica de Honduras del Decreto No. 3-2002, emitido por el Congreso Nacional el 26 de Enero del 2002. Tengo la autoridad de emitir declaraciones de típos ilustrativas o doctrínales en las cuales el Estado de Honduras de a conocer se posición oficial bajo la Ley de la Procuradoria General de la República.

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Administración" o Actos Administrativos que de acuerdo a la doctrina legal se consideran como aquellos actos jurídicos de la función administrativa que constituyen la voluntad, juicio, conocimiento o deseco del órgano de los emite, y como tales, derivan de ellos efectos jurídicos.

B) La Ley dice que: "[l]os actos de los órganos de la Administración pública adoptarían la forma de Decretos, acuerdos, Resoluciones o Providencias" (Art. 116 de la Ley General de la Administración Pública), y son nulos "a) Los Dictados por órganos absolutamente incompetente, ... [y] c) Los dictados prescindiendo total y absolutamente del procedimiento establecido" (Art.34 de la Ley de Procedimiento Administrativo). En consecuencia, cualquier acto creado violentándose esa normativa legal, no tiene valor ni efecto jurídico[2].

C) El Onceavo Circuito basó su interpretación de las leyes hondureñas en el testimonio de funcionarios que prestaron una colaboración no oficial ni vinculante, a los funcionarios estadounidenses.

D) Honduras ha participado en este caso únicamente a través de su Ministro de Agricultura y Ganadería, mediante Resolución de fecha 15 de Noviembre del 2,001; así como a través de esta Procuraduría General de la República y de la Embajada de Honduras en los Estados Unidos, actuando como *Amicus Curiae* ante el Onceavo Circuito. El Gobierno de Honduras no ha cambiado su posición oficial, sino que se refiere a aspectos estrictamente legales contenidos en este documento.

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[2] Para más detalle ver la Declaración presentada ante el Onceavo Circuito.

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VII. La interpretación de la Ley en el sistema jurídico hondureño.

A) En Honduras, existen tres tipos de interpretación de las leyes:

1. **La interpretación auténtica**: Esta interpretación emana del legislador al explicar el sentido de sus propias leyes.
2. **La interpretación judicial**: Esta interpretación es impuesta por los tribunales de justicia al aplicar las leyes en casos concretos.
3. **La interpretación doctrinal**: Esta interpretación es la que hacen los juristas o jurisconsultos al exponer su opinión personal y recibe su fuerza de la experiencia y sabiduría de sus autores.

B) En nuestro sistema legal, la interpretación judicial es aplicable al caso en que se dicta la sentencia y no tiene efectos generales como precedente judicial ("stare decisis") como ocurre en el sistema jurisprudencial de los Estados Unidos. Por tal razón y como respuesta a la necesidad de que exista una interpretación general de la Ley, nuestra legislación prevé que "solo toca al legislador explicar o interpretar la ley de un modo generalmente obligatorio" (Art. 3 del Código Civil).[3]

C) Cuando el Congreso Nacional interpreta una ley, no la está reformando. La reforma es otra de las atribuciones que tiene el Congreso Nacional. La Constitución de la República establece en su Art. 205 numeral 1 que el Congreso Nacional tiene la atribución de "Crear, decretar, ***interpretar***, ***reformar*** y derogar las leyes" (énfasis agregado). Al utilizar términos diferentes para

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[3] Este precepto no es único de la legislación hondureña, sino que es similar en casi todos los sistemas juridicos civiles basados en el derecho rontano y tiene su origen en el Código de Justianíano que incluye el principio que debe "interpretar la ley quíen la hace."

"interpretar" y "reformar" las leyes, la Asamblea Nacional Constituyente tomo la decisión consciente de diferenciar ambos términos. Por eso, el termino "interpretar" no incluye "reformar" y una interpretación de la ley no es una reforma.

D) En el vernáculo, la palabra "interpretar" quiere decir "Explicar o Declarar el sentido de una cosa, principalmente de textos faltos de claridad" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Edición). El Diccionario de Derecho Usual define la palabra "interpretación" como la "declaración", explicación o aclamación del sentido de una cosa o de un texto incompleto, oscuro o dudosa", y define explícitamente la frase "interpretación auténtica" como "la aclaración que el propio legislador hace de una ley dictada por el" (Diccionario de Derecho Usual, Guillermo Cabanellas, Sexta Edición). La palabra "interpretación" de ninguna manera incluye *el cambio* del sentido de lo interpretado.

E) Si el Congreso nacional, al interpretar una ley esta únicamente explicando el sentido de la misma, lógicamente tal explicación no da lugar a ningún problema de retroactividad, porque la explicación da el sentido que la Ley siempre ha tenido. Consecuentemente tal interpretación requiere que la misma sea incorporada al momento de aplicar la ley interpretada en cualquier caso pendiente.

F) Es importante diferenciar entre una interpretación doctrinal y la interpretación auténtica del legislador. La primera es la opinión de juristas que pueden ilustrar respecto a determinado aspecto de la ley, lo que llamamos "peritos" tal y como han comparecido varias personas para ambas partes lanto particulares como empleados gubernamentales. La interpretación auténtica del legislador es la Ley misma y por lo tanto es incuestionable. Los tribunales de justicia en este ultimo caso no deben discutir si están convencidos con la

interpretación, simplemente deben aceptarla sin discusión[4].

G) En nuestro sistema legal, la interpretación auténtica del legislador tiene efectos similares a los que tiene en los Estados Unidos la interpretación de una ley por la Corte Suprema. Ambos son la máxima autoridad para interpretar las leyes en nuestros países.

H) Si cualquier persona se siente perjudicada por una Ley interpretativa y considera que el Congreso Nacional ha actuado incorrectamente al efectuar dicha interpretación, puede interponer ante la Corte Suprema de Justicia el Recurso de Inconstitucionalidad.

VIII. Resoluciones emitidas por un Ministro son actos administrativos similares a fallos judiciales y tienen efectos jurídicos similares.

A) "La Resolución pondrá fin al procedimiento y en su parte dispositiva se decidirán todas las cuestiones planteadas pro los interesados ..." (Art. 83 de la Ley de Procedimiento Administrativo). La Resolución es el acto mediante el cuál la Administración expresa su posición con respecto a las cuestiones solicitadas por los interesados al iniciar un procedimiento mediante un petición formal. Es por lo tanto el acto mediante en el cual el Estado expresa su voluntad o decisión coa respecto a una situación determinada planteada por una parte interesada.

B) La Resolución del Ministro de Agricultura y Ganadería emitida el 15 de Noviembre del 2001, concluyendo el procedimiento administrativo iniciado por el Comisionado Nacional de los Derechos Humanos, tiene eficacia jurídica de acuerdo con las leyes de Honduras,

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[4] El único caso en que un Tribunal de Justicia puede dejar de incorporar una interpretación legislativa a la ley interpretada es en el cual existe una determinación de inconstitucionalidad declarada por la Corte Suprema de Justicia.

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establece la decisión del Estado con respecto al planteamiento establecido por este Comisionado en su informe y establece la norma de conducta correcta dentro del Ministerio de Agricultura y Ganadería.- De acuerdo al Art. 8 de la Ley General de la Administración Pública, los órganos de la Administración Pública no podrán vulnerar las disposiciones dictadas por un órgano de grado superior, la cual por ende deber ser obedecida por todos los funcionarios de dicho Ministerio.

C) Esta resolución administrativa, a pesar de que es uno acto oficial del Gobierno de Honduras y que equivale a una sentencia judicial, no ha sido aplicada por la Corte de Apelaciones.

D) Es importante destacar la diferencia que existe entre la Resolución del Ministro de Agricultura y Ganadería del 15 de Noviembre del 2001 con la que concluye el procedimiento iniciado por el Comisionado Nacional de los Derechos Humanos, y la Resolución 030-95, que sirve de sustento para la acusación. La Resolución del 15 de Noviembre es el acto mediante el cuál la administración formalmente decide la cuestiones planteadas en una petición después de seguir el procedimiento mandado pro Ley. En cambio, la Resolución 030-95 establece medidas de carácter reglamentario que son atribuidas al Presidente de la República[5]. Los tribunales de la Jurisdicción de lo Contencioso administrativo consideraron la Resolución 030-95 como un Reglamento y declararon su nulidad con base en el Art. 34 de la Ley de Procedimiento Administrativo pro haber sido dictado por un órgano absolutamente incompetente[6] y pro prescindir del procedimiento requerido.

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[5] La excepción ocurre cuando la ley expresamente le atribuye esta facultad de reglamentar a un órgano diference.

[6] La Constitución de la República establece que es el Presidente de la Republica el responsable de emitir las normas de carácter general. Para

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E) Si cualquier persona que se considere afectada, considera que el Ministro de Agricultura y Ganadería ha actuado incorrectamente al emitir su Resolución del 15 de Noviembre, puede acudir a los Tribunales de la Jurisdicción de lo Contencioso Administrativo para demandar que el acto se declare ilegal y sea anulado. Mientras esto no ocurra, este acto de la administración es legitimo y tiene eficacia jurídica.

IX. Cuando existen dudad con respecto a la interpretación de una determinada Ley "se interpretarán los pasajes obscuros o contradictorios del modo que más conforme parezca al espíritu general de la legislación y a la equidad natural" (Art. 20 del Código Civil).

A) En nuestro sistema legal existen principios generales del derecho que comúnmente se conocen y utilizan. Dichos principios, derivados generalmente del derecho romano, por no estar codificados, pueden resultar contradictorios para otro Sistema Legal diferente.

B) Las Leyes se interpretan usando el significado de las palabras utilizadas por el Legislador, el contexto de la ley misma, los principios generales del derecho, la intención del legislador y la equidad natural. No se debe asumir que el legislador emite Leyes que lesionan el interés del país.

C) La ley se puede traducir del español al ingles de maneras diferentes, las cuales pueden sugerir diferentes significados. Por eso es importante que las Cortes estadounidenses no deben dar una interpretación literal a los términos utilizados en las traducciones de materiales legales extranjeros, y que las indicadas Cortes reconozcan que los Gobiernos extranjeros (cuyas leyes las cortes deben interpretar) tienen el criterio experto que permite poner a tales traducciones en el

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mes detalle, ver la lra Declaración de esta Procuradurin General presentada ante la Corte de Apelaciones del Onceavo Circuirte.

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contexto legal extranjero y así darles a las leyes traducidas la interpretación mas acorde a la intención del legislador natural y a la coherencia interna del sistema legal extranjero.

X. Las Leyes y Regulaciones Hondureñas Controvertidas del Caso:

A) Resolución 030-95

La Resolución 030-95, como hemos mencionado anteriormente, fue declarada Nula de Pleno Derecho, *ab initio o ex tunc*, por los Tribunales de lo Contencioso Administrativo por haber sido emitida en violación de las leyes de nuestro país al "haber infringido el ordenamiento jurídico al momento de emitir[a]."

En vista de que las resoluciones impugnadas, incluyendo la Resolución 030-95, eran consideradas firmes, la acción directa de impugnación podía ser interpuesta únicamente sobre la base prevista en el Art. 32 la Ley de la Jurisdicción de lo Contencioso-Administrativo. En tal sentido, cuãndo los Tribunales de lo Contencioso Administrativo declararon la nulidad de esos actos, necesariamente determinaron que las Resoluciones eran Nulas de Pleno Derecho o Nulas Absolutamente aunque surtían efectos antes de haber side declaradas nulas por los tribunales competentes.

Para entender mejor la Nulidad Absoluta de la Resolución 030-95, es importante comprender el significado de la ***Nulidad de Pleno Derecho*** conocida también como ***Nulidad Absoluta.***

La Nulidad de Pleno Derecho, o ***Nulidad Absoluta***, es el grado máximo de invalidez. Los supuestos de Nulidad Absoluta en el derecho administrativo son más restringidos que en derecho común y se limitan a aquellos expresamente

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enumerados en las leyes administrativas.[7] La Nulidad de Pleno Derecho tiene las siguientes características:

1. La acción para hacer valer la infracción es imprescriptible: La Nulidad se puede alegar en cualquier momento, aún y cuando el acto fuese considerado firme. Esto lo reconoce expresamente la Ley de la Jurisdicción de lo Contencioso Administrativo en su Art. 32 al "admitir[] la acción Contendiese-Administrativa contra los actos firmes... cuando fueren nulos de pleno derecho y estén surtiendo efectos."
2. El defecto no puede ser subsanado: Nuestra legislación administrativa establece una diferencia entre los actos nulos y los actos anulables.[8] Los defectos del acto anulable son susceptibles de subsanación ya sea por el simple transcurso del tiempo o por otros medios, mientras los defectos del acto Nula de Pleno Derecho no lo son. Por esta razón es necesaria su declaración de nulidad.
3. La declaración de nulidad goza de eficacia *ex tunc o ab initio*. La declaración de Nulidad Absoluta de un acto priva de efectos al acto desde el momento en que se produjo. Esto tiene su fundamento en el Principio General del

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[7] En la legislación administrativa hondureña, "[s]in perjuicio de lo establecido en leyes especiales," los supuestos de nulidad absoluta se encuentran enumerados en el Art. 34 de la Ley de Procedimiento Administrativo (Decreto No. 152-87 del 28 de Septiembre de 1987), entre los que mencionamos "a) Los dictados por órgano absolutamente incompetente" y "c) Los dictados prescindiendo total y absolutamente del procedimiento establecido."

[8] Articulos 34, 35, 35 y 37 de la Ley de Procedimiento Administrativo entre otros.

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Derecho que requiere que el acto mulo se trate como si nunca se hubiese realizado.[9]

La Nulidad de Pleno Derecho de un acto administrativo no es automática. Una declaración del órgano competente, que en nuestro país son los Tribunales de lo Contencioso Administrativo, es necesaria para darle efecto. Una vez que la nulidad sea declarada, sus consecuencias son las mismas que en el Derecho común.

Habiendo explicado las características de la ***Nulidad de Pleno Derecho o Absoluta***, analizamos la relación de la primera con el Art. 32 de la Ley de Jurisdicción, de lo Contencioso Administrativo.

El Art. 32 establece que "[s]e admitirá la acción . . . contra los actos firmes . . . cuando fueren ***nulos de pleno derecho*** y estén efectos" (énfasis agregado). Debido a que esta declaración de Nulidad de Pleno Derecho es *ab initio o ex tunc*, el Estado se encontraría en plegó de ser demandado por danos resultantes de la aplicación de actos impugnados antes de su declaración de nulidad.

Previendo esta situación, dicho articule disponme que "[s]e admitirá la acción Contencioso-administrativo... ***pero ella únicamente para fines de su anulación e inaplicabilidad futura***" (énfasis agregado), incluyendo esta última para la protección del gobierno.[10] Esta parte final no califica ni altera el efecto *ab initio* de la declaración de nulidad, ni convalida en ningún momento un acto que ha sido declarado ***Nulo de Pleno Derecho*** por la autoridad judicial competente.

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[9] El Código Civil de Honduras establece que debe existir "la debida armonia y correspondencia" entre las leyes (Art. 19), por lo que el articulo 1596 del referido Código fortalece aún más la aplicación de este principio al disponer que "la nulidad absoluta . . . declarada por sentencia Erme, da[] derecho a las partes para ser restituidas al mismo Estado en que se hallaban si no hubiese existido el acto . . . milo."

[10] Si la declaración de Nulidad de Pleno Derecho no fuese *ab initio o ex tunc*, seria compleramente innecesaria la inclusión de esta frase en el Articulo 32 relacionado.

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Como expresé en mi declaración ante el Onceavo Circuito, el propósito de la parte final del articulo en cuestión es "proteg[er] [al Estado] por los danos y prejuicios que pudiese haber ocasionado la aplicación de un acto nulo de pleno derecho."

No cabe duda que conforme a las leyes de Honduras, la Resolución 030-95 fue declararía. Nula de Pleno Derecho, *ab initio o ex tunc*, por los Tribunales de lo Contenciosa-Administrativo. Siendo declarada Nula, La Resolución 030-95 se trata como que nunca existió y no se sigue aplicando en ningún caso pendiente, incluyendo casos criminales como el caso presente.

B) Acuerdo No. 0008-93

El Acuerdo 0008-93, promulgado para implementar la Ley de Industrialización de la Carne (Decreto Ley No. 40), no ha sido legalmente válido desde 1995, cuando fue derogada la Ley en base a la cual el Acuerdo fue emitido.

Histórica y Jurídicamente, un Reglamento deja de tener validez al derogarse la Ley que lo habilitaba. Este principio está basado en los Principios Generales del Derecho aceptados en Honduras.[11]

Además, mediante Decreto No. 198-2001, el congreso Nacional incorporó este principio preexistente al cuerpo legal del Art. 43 del Código Civil, explicando que "la derogación expresa . . . de una ley, deja sin valor ni efectos jurídicos el reglamento . . . emitido para desarrollar la Ley derogada."

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[11] El Principio General del Derecho en este sentido lo resumió el Comisionado Nacional de los Derechos Ilumanos, Dr. Leo Valladares en su Informe Especial como "La antigua máxima de que lo accesorio sigue la suerte de lo principal." Este principio tiene su origen en al precepto del Derecho Romano que dice: "*cuando no subsiste lo principal, no puede subsiste lo accesorio.*" Siendo la "ley" lo principal y el "reglamento" lo accesorio, este el reglamento signe la suerte de la ley, es decir que al derogar la ley, el reglamento también es derogado.

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La Procuraduría General de la República coincide con los grandes juristas hondureños[12] que emitieron declaraciones sobre este particular en este paso al manifestar que es otro Principio General del Derecho que "los efectos de la ley interpretativa se retrotraen a la fecha de la vigencia de la ley interpretada." O sea que, la interpretación de una ley no altera su sentido, pero simplemente aclara el significado que siempre ha tendió la ley interpretada desde el momento de su nacimiento[13]. Nos cabe destacar que el Decreto Interpretativo es obligatorio por ser Ley.

C) Art. 70(3) de la Ley de Pesca

El Art. 70(3) del Decreto No. 139 del 19 de Mayo de 1959[14] presenta una redacción que dificulta su interpretación, aún para las mismas autoridades hondureñas. Esta provisión literalmente dice: "Art. 70- Se castigará con trescientos lempiras o trescientos días de reclusión las siguientes infracciones: . . . (3) El que destruya o recoja con fines de lucro los huevos, crías de los peces, quelonios u otras especies acuáticas."

Esta Procuraduría General de la República considera que el Art. 70(3) solamente prohibía la destrucción o recolección de los huevos o de las crias de los peces, quelonios u otras

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[12] El Abogado José Oswaldo Ramos Soto, Ex Presidente de la Corte Suprema de Justicia y Ex Decano y Profesor de derecho Constitucional de la Facultad de Derecho de la Universidad Nacional Autónoma de Honduras, el Abogado Nicolás Cruz Torres, Ex Magistrado de la Corte Suprema de Justicia, y el Abogado Roberto Zacapa, autor de varias obras literarías sobre el Derecho en Honduras, son reconcídos juristas de mucho prestigio en Honduras y sus interpretaciones legales gozan de gran respeto.

[13] Ver parte II de esta declaración referente a "La interpretación de la Ley en el sistema jurídico hondureño, pp. 2, 3 y 4).

[14] El Artienio 70 fue reemplazado por en nuevo texto que se encuentra en el Decreto 245-2000. Este Nuevo Decreto no incluye la prohibición contenida en el numeral 3 del articulo 70 original, lo que de acuerdo a nuestra Constitución debe ser aplicado retroactivamente para el beneficio del acusado.

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especies acuáticas no así la destrucción o recolección de las especies ovadas.- El Art. 70(3) requiere que exista un lucro directo proveniente de los huevos, el cual no ocurre con los huevos de las langostas porque no tienen ningún valor comercial.

CONCLUSION

Por lo antes expuesto, con el respeto y las consideraciones que esa Honorable Corte Suprema de Justicia se merece, le rogamos acepte como correctas las interpretaciones expuestas por la Procuraduría General de la República de Honduras, conforme queda relacionado.

So pena de perjurio, declaro que la información aquí contenida es verídica y correcta.

Rubricadas y selladas cada una de sus páginas, en la cuidad de:

Tegucigalpa, M.D.C. 23 de Diciembre del 2003.

Dr. SERGIO ZAVALA LEIVA
PROCURADOR GENERAL DE LA REPUBLICA
DE HONDURAS.

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Dice: SERGIO ZAVALA LEIVA

Puesta en su carácrer de: PROCURADO GENERAL DE LA REPUBLICA DE HONDURAS

TEGUCIGALPA, M.D.C., 24 DICIEMBRE DE 2003.

JOSE R. LAGOS VALERIANO
ENCARGADE DE
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